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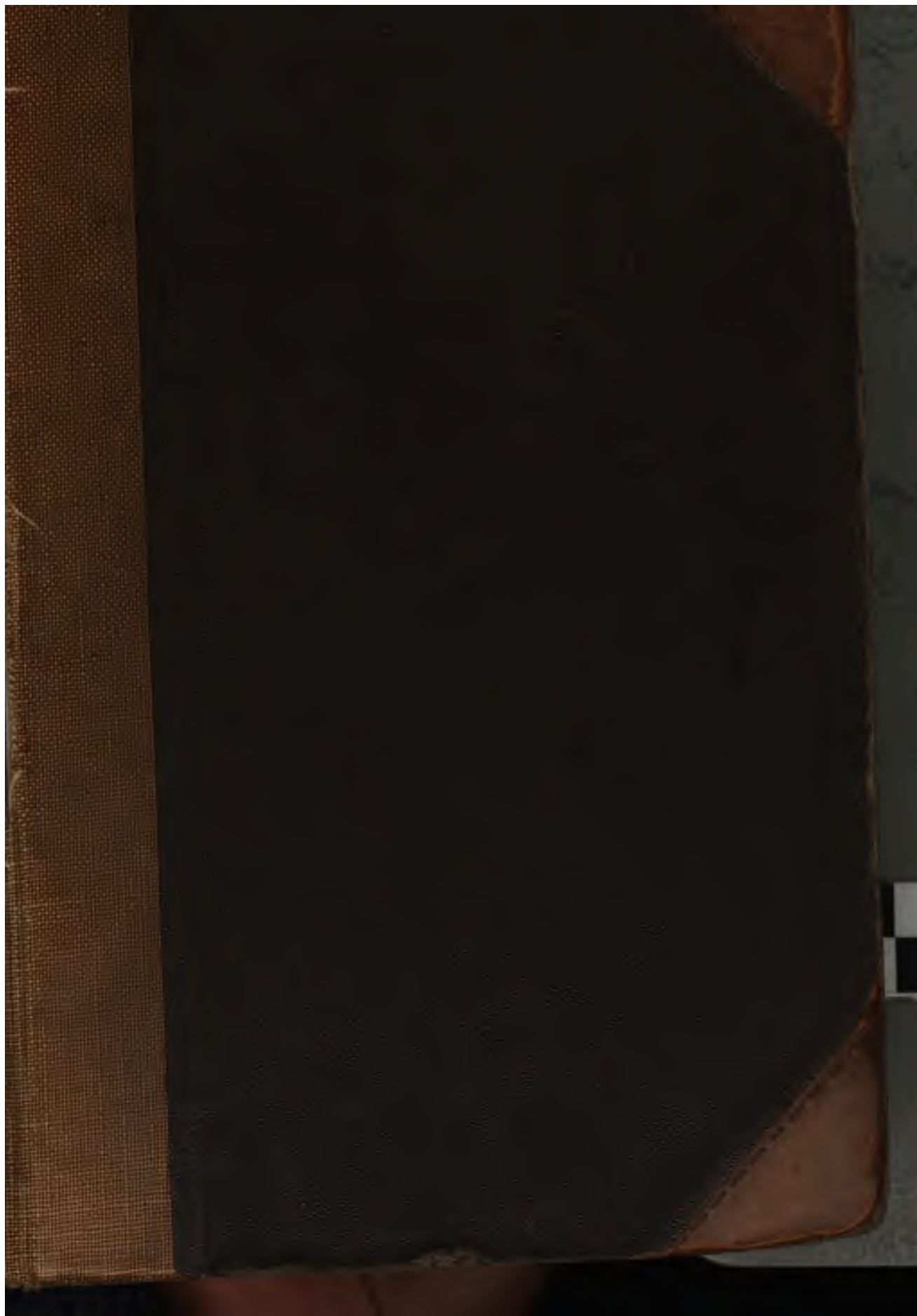
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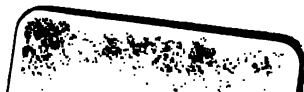
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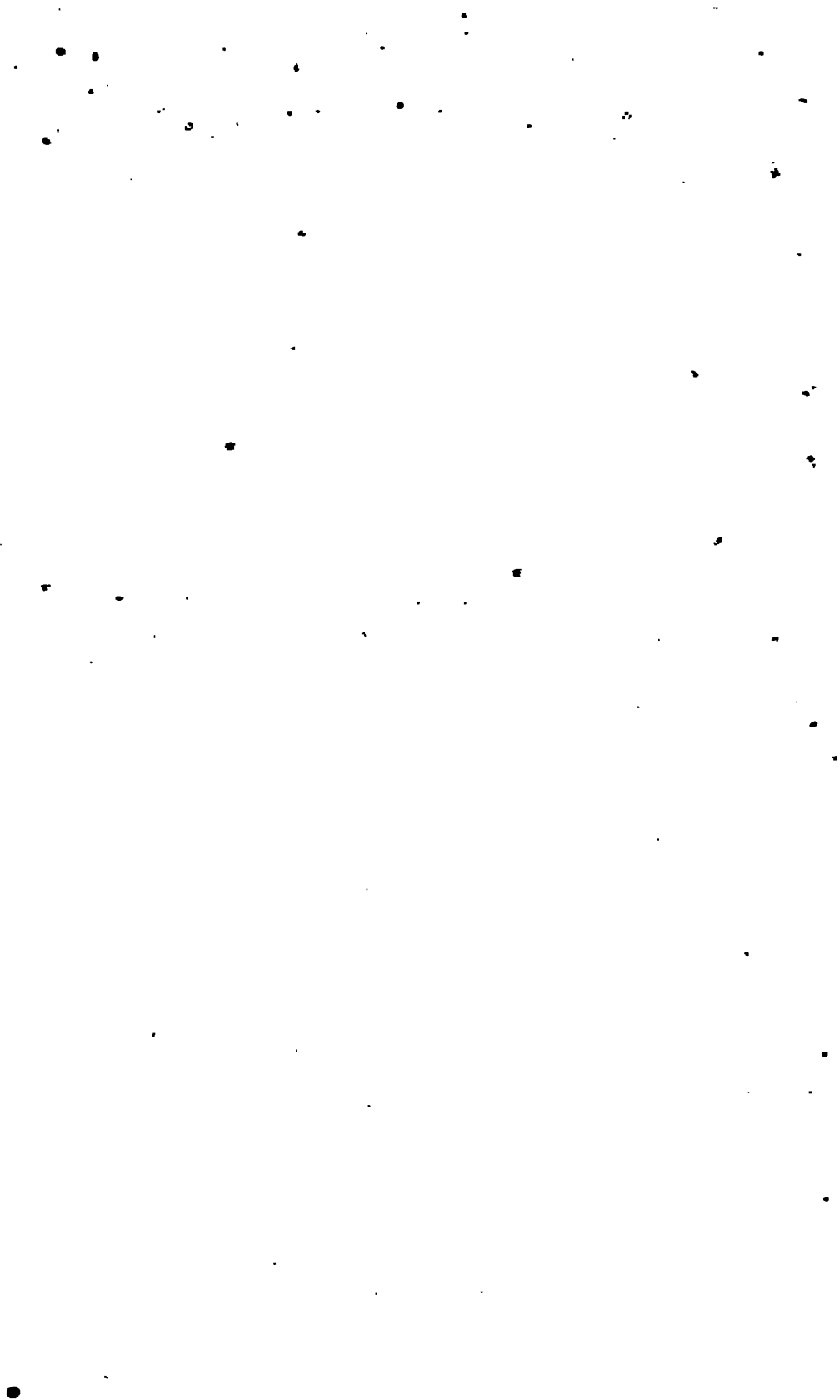


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REPORTS
OF
CASES
ARGUED AND DETERMINED IN
THE COURT OF QUEEN'S BENCH,
AND
THE COURT OF EXCHEQUER CHAMBER
ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED,
AND AN INDEX OF THE CONTENTS.

BY
WILLIAM MAWDESLEY BEST, OF GRAY'S INN,
AND
GEORGE JAMES PHILIP SMITH, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

VOL. III.
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The Right Hon. Sir ALEXANDER JAMES EDMUND
COCKBURN, Bart., C. J.
Sir WILLIAM WIGHTMAN, Knt.
Sir CHARLES CROMPTON, Knt.
Sir COLIN BLACKBURN, Knt.
Sir JOHN MELLOR, Knt.

ATTORNEY GENERAL.
Sir WILLIAM ATHERTON, Knt.

SOLICITOR GENERAL.
Sir ROUNDELL PALMER, Knt.

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CORRIGENDA.

- Page 18, line 23, for "appellant" read "appellants."
19, line 8 from bottom, for "his" read "their."
75, line 7, for "render" read "renders."
79, line 25, for "lessons" read "lessens."
90, last line, after "non" insert ", as to costs."
98, line 6, for "Erle J." read "Erle C. J."
171, note (b), for "4 Bligh, N. R." read "4 Bligh, N. S."
278, erase note (a).
317, line 7, for "Mellish" read "Manisty."
449, line 7 from bottom, insert "contra."
461, line 18, erase the inverted commas.
483, note (a), for "1 H. B." read "1 H. Bl."
483, line 12, insert "contra."
495, line 12 from bottom, after "Mich. Term" insert "1862."
541, line 4 from bottom, insert "contra."
583, line 9, for "Edward Jones" read "Edward James."
720, line 8 from bottom, for (c) read (d).
722, line 14, *The New River Company*, appts., *Johnson*, resp't, is now reported
in 2 E. & E. 435.
766, note (a), for "2 Bing. N. C." read "5 Bing. N. C."
805, to side note add "*Estoppel*."
831, note (c), for "Allyn" read "Al."

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY VACATION,

XXVI. VICTORIA.

The QUEEN *against* The Vestry of LAMBETH.

*Saturday,
June 28th.*

Vauxhall Bridge was built by a Company under stat. 49 G. 3. c. cxlii., by which they were empowered to make (amongst others) a road leading from the bridge to the turnpike road in the parish of *Lambeth*, and were required to put up lamp-posts and lamps for lighting the bridge, and upon the sides of it, and also upon the sides of the road, under pain of being indicted; and the tolls were to be applied in lighting the bridge and road. Half the bridge which adjoins the county of *Surrey* was to be deemed in the parish of *Lambeth*, but was not to be deemed a county bridge so as to subject the county or parish to the repairs of the bridge or road. By a lighting and paving Act, 9 & 10 Vict. c. cccl., Commissioners were appointed for putting that Act into execution; by sect. 50 they were authorized and empowered to cause (amongst others) the road to the middle of *Vauxhall Bridge* to be kept properly lighted; and by sect. 54 it was enacted that it should be lawful for them to cause such of the streets as they should think proper to be lighted; and by sect. 62 "the present lamps and lamp-posts in the streets and other places within the district or limits mentioned in the Act, and which shall or may hereafter be erected or fixed by virtue of that Act, shall belong to and be the property of the Commissioners." By The Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 90., all the duties, powers and authorities for and in relation to the lighting any parish mentioned in the Schedule (A) (*Lambeth* being one), or any part of such parish, which at the passing of the Act were vested in any Commissioners or in any other body than the vestry of such parish, are to be vested in and performed by the vestry; and by sect. 93 all property, matters and things vested in such Commissioners or other body, in connection with any such duties or powers, are vested in the vestry of the

*Metropolis
Local Manage-
ment Act,
18 & 19 Vict.
c. 120. ss. 90.
130. 250.
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parish. By sect. 130, the vestry shall cause the several streets within their parish to be well and sufficiently lighted; and by sect. 250 the word "street" applies to and includes any bridge not being a county bridge. Held that, by stat. 9 & 10 *Vict. c. cccl.*, the property in the lamps along the road and on half the bridge was vested in the Commissioners; and the obligation to light the road and half the bridge was transferred from the Bridge Company to the Commissioners; and by The Metropolis Local Management Act, 18 & 19 *Vict. c. 120. ss. 90 and 93*, the property in such lamps and the obligation to light the bridge were transferred from the Commissioners to the vestry of the parish of *Lambeth*.

Seemle, if stat. 9 & 10 *Vict. c. cccl.* had not transferred the obligation and the property from the Bridge Company to the Commissioners, they would be transferred to the vestry from the Bridge Company by sect. 90 of stat. 18 & 19 *Vict. c. 120*.

MANDAMUS to the vestry of the parish of *Lambeth*, in the county of *Surrey*. The writ recited that the parish of *Lambeth* was one of the parishes mentioned in Schedule (A), annexed to the Act for the better Local Management of the Metropolis, 18 & 19 *Vict. c. 120.*, and that the vestry had been constituted a body corporate under and by virtue of that Act: that *The Vauxhall Bridge Company* had many years since, under and by virtue of stats. 49 *G. 3. c. cxlii.* and 52 *G. 3. c. cxlvii.*, built a bridge across the river *Thames* from or near *Vauxhall* Turnpike, in the parish of *St. Mary, Lambeth*, in the county of *Surrey*, to the opposite shore, in the parish of *St. John*, in the city and liberty of *Westminster* and county of *Middlesex*, and had made certain roads as approaches thereto, and had thenceforth maintained the same according to those Acts; and the same had been used by the public, subject to the payment of tolls authorized by stat. 49 *G. 3. c. cxlii.*, and under and according to that Act; and that, by virtue of the last mentioned Act, half the bridge next adjoining to the city and liberty of *Westminster* was deemed to be and was in the city and liberty of *Westminster* and county of *Middlesex*, and part of and in the parish of *St. John, Westminster*, and the other half of

the bridge, adjoining to the county of *Surrey*, was deemed to be and was in the county of *Surrey*, and part of and in the parish of *St. Mary, Lambeth*, and never had been nor was deemed or taken to be a county bridge so as to subject the city or liberty of *Westminster*, or the counties of *Middlesex* or *Surrey*, or any of the parishes or places in the said Acts mentioned, or either of them, to the repairing or supporting of the same, or of any of the roads by those Acts directed to be made: that by stat. 9 & 10 *Vict. c. cccl.*, entitled "An Act to repeal an Act of the 52d year of the reign of King *George* the 3d, for lighting and watching the road leading from *Newington Butts* to *The Nag's Head* on the *Wandsworth Road*, and other places, communicating therewith, in *Lambeth*, *Clapham* and *Battersea*, in *Surrey*; and for making other provisions for lighting and improving the said roads, and other places adjacent or near thereto," the Commissioners therein named and appointed were authorized and empowered to cause to be properly lighted and kept lighted, amongst other roads, streets and places, the road or street from and including the house in the occupation of *Robert Drummond*, opposite *Vauxhall* Turnpike, to the middle of *Vauxhall Bridge* (which road, street, and place was and is the road made and maintained by the *Vauxhall Bridge Company*, in the parish of *Lambeth*, under stat. 49 *G. 3. c. cxlii.*, as an approach to the said bridge from the public highway in the parish of *Lambeth*), and so much of the said bridge as was in that parish: that the Commissioners, under and by virtue of stat. 9 & 10 *Vict. c. cccl.*, took upon themselves to light, and up to the time when their powers ceased under and by virtue of stat. 18 & 19 *Vict. c. 120.*, continued to light, part of the road made and main-

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1862. tained by *The Vauxhall Bridge Company*, (to wit) the
 The QUEEN road or street from and including the house in the occu-
 v. pation of *Robert Drummond*, opposite *Vauxhall Turn-*
 Vestry of pike, to the foot of *Vauxhall Bridge*: and that the
 LAMBETH. defendants had since continued to light so much of the
 said road or street. The writ then alleged that the
 half of *Vauxhall Bridge* within the parish of *Lambeth*
 was a street within that parish which the defendants
 were authorized and empowered and directed to light,
 and that the same had not been well and sufficiently
 lighted by them; and that they had been duly required,
 by and on behalf of the *Vauxhall Bridge Company*, well
 and sufficiently to light the same, and for that purpose
 to maintain, or set up and maintain, a sufficient number
 of lamps in the street, and to cause the same to be
 lighted with gas or otherwise and to continue lighted at
 and during such times as the defendants might think fit,
 necessary or proper; but that the defendants had neg-
 lected and refused well or sufficiently or in any manner
 to light the part of the bridge so being such street in
 the parish of *Lambeth*, or any part thereof, or to main-
 tain, or set up and maintain, a sufficient or any num-
 ber of lamps in the street, or any lamp therein: and
 commanded the defendants to cause that part of *Vaux-*
 hall Bridge which was within the parish of *St. Mary,*
 Lambeth, to be well and sufficiently lighted; and for
 that purpose to maintain, or set up and maintain, a
 sufficient number of lamps, and to cause the same to be
 lighted with gas or otherwise and to continue lighted,
 according to the direction of stat. 18 & 19 *Vict. c. 120*.

Return. That the half of *Vauxhall Bridge* within
 the parish of *Lambeth* was not a street within the parish
 of *Lambeth* which the defendants were authorized and
 directed to light.

Plea. That *Vauxhall Bridge*, including the half thereof in the parish of *Lambeth*, was, for a long time before and at the time of the passing of stat. 9 & 10 *Vict. c. cccl.*, dedicated to and frequented, and used by the public as, and was a public highway and thoroughfare, subject to payment of tolls to the said Company, from and to divers highways and places in the parish of *Lambeth*, to and from divers highways and places in the city of *Westminster*, and was much frequented and used by the public as such thoroughfare and highway as well by night as by day, and at all times of the night and day, on foot, and with carriages and cattle; and it had become and was necessary for the public convenience and safety that the bridge should be lighted at night; and the bridge had continued to be so used by the public as such thoroughfare and highway from thence hitherto, and it had been thence hitherto and still was necessary for the public convenience and safety that the bridge, including the half thereof in the parish of *Lambeth*, should be so lighted; and that the half of *Vauxhall Bridge* in the parish of *Lambeth*, was a "street" within the said parish, which the defendants were authorized and empowered and directed to light.

Demurrer, and joinder therein.

The case was argued, in *Trinity Term*, *June* 11th and 12th, before WIGHTMAN, CROMPTON and BLACKBURN JJ.

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Bovill, (with him *Digby Seymour* and *Foot*), for the defendants, cited sects 42, 46, 117, 120, 123, 125, of stat. 49 *G. 3. c. cxlii.*; and contended that the obligation to light the half of *Vauxhall Bridge*, imposed upon the Bridge Company by sect. 113, was part of the consideration for their right to take tolls, given by sects. 89, 94; and that that section was not repealed either by

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stat. 9 & 10 *Vict. c. cccl. ss. 50. and 54*, which were affirmative and empowering only; *Dakins v. Seaman* (a), per *Parke B.*; or by The Metropolis Local Management Act, 18 & 19 *Vict. c. 120.*, according to the maxim *Generalia specialibus non derogant*; *The London and Blackwall Railway Company v. The Board of Works for the Limehouse District* (b), per *Wood V. C.*: [he cited sects. 62, 94 of stat. 9 & 10 *Vict. c. cccl.*, and sects. 90, 93, 94, 96, of stat. 18 & 19 *Vict. c. 120.*] Also that the word "street," in sect. 130 of stat. 18 & 19 *Vict. c. 120.*, was not extended by the interpretation clause, sect. 250, to include a bridge belonging to a private Company, upon whom an obligation had been imposed in consideration of a power to take tolls; as that clause only has reference to sect. 144.

Denman (with him *Prendergast*), for the prosecutors, contended that, by stat. 9 & 10 *Vict. c. cccl.*, the liability to light the half of *Vauxhall Bridge* was imposed on the Commissioners for executing that Act, and that such liability was, by stat. 18 & 19 *Vict. c. 120. s. 90.*, transferred to the vestry of *Lambeth*, who represent the Commissioners: [he cited stats. 49 *G. 3. c. cxlii. ss. 42, 46, 89, 117, 125*; 9 & 10 *Vict. c. cccl. ss. 51, 62, 142*; 18 & 19 *Vict. c. 120. ss. 93, 130, 250.*] He further argued that the maxim *Generalia specialibus non derogant* did not apply as between the Bridge Company and the Commissioners; *Daw v. The Metropolitan Board of Works* (c); that permissive words in an Act of Parliament are construed as obligatory where the matter is for the public benefit or in advancement of public justice; *Rex et Reg. v. Barlow* (d); *Reg. v. The Tithe Commis-*

(a) 9 *M. & W.* 777. 789.

(b) 3 *Kay & John.* 123. 127.

(c) 12 *C. B. N. S.* 161.

(d) 2 *Salk.* 609.

sioners (a), Macdougall v. Paterson (b); and that the half of *Vauxhall Bridge* was a street within the parish which the vestry were bound to light by stat. 18 & 19 *Vict. c. 120. s. 130.* according to the definition of that word given by sect. 250.

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Bovill was heard in reply.

Cur. adv. vult.

WIGHTMAN J. delivered the judgment of the Court.

It is extremely difficult, if not impossible, to reconcile satisfactorily the provisions of the several Acts of Parliament referred to upon the argument in this case; but, upon the best consideration that we can give to the questions raised between the parties, it appears to us that the duty of lighting the half of *Vauxhall Bridge* which is in the parish of *Lambeth* has devolved upon the vestry of the parish by virtue of the 9 & 10 *Vict. c. cccl.* and the 18 & 19 *Vict. c. 120.*, and that *The Vauxhall Bridge Company* are absolved from that duty.

The Bridge was built under and subject to the provisions of the 49 *G. 3. c. cxlii.*, and by the 46th section of that Act the Bridge Company have power to make roads for a proper access to the Bridge, and, amongst others, one from the foot of the bridge to the turnpike road leading to and near *Vauxhall Turnpike* in the parish of *Lambeth*. By the 113th section of that statute, the Bridge Company are required to put up lamp-posts and lamps for lighting the Bridge upon the sides of it, and also in and upon or along the sides of the said road or upon or

(a) 14 *Q. B.* 549, 474.

(b) 11 *C. B.* 755.

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against any wall or palisade of any house, messuage or tenement fronting the said road; and by the 123rd section one of the first purposes to which the tolls are to be applied is the keeping the bridge and road lighted; and by the 125th section the Company may be indicted if they fail in so doing. By the 120th section of the Act the half of the bridge which adjoins the county of *Surrey* is to be deemed part of and in the parish of *St. Mary, Lambeth*.

From the time the bridge was built until the passing of the 9 & 10 *Vict. c. cccl.*, there seems to have been no question but that the Bridge Company and they only were subject to the duty of keeping, not only the bridge, but also the road properly lighted. By the 9 & 10 *Vict. c. cccl.*, entitled "An Act to repeal an Act of the 52d year of the reign of King *George* the 3d, for lighting and watching the road leading from *Newington Butts* to *The Nag's Head* on the *Wandsworth Road*, and other places communicating therewith, in *Lambeth, Clapham*, and *Battersea* in *Surrey*; and for making other provisions for lighting and improving the said road, and other places adjacent or near thereto," certain Commissioners were appointed (by the third section) for putting that act in execution; and by the 50th section the Commissioners were authorized and empowered to cause the several roads, streets, and places, and parts thereof respectively, as thereafter mentioned and described, to be properly lighted, and to be kept lighted; and then followed an enumeration of roads, streets, and places, and amongst them "the road or street from and including the house in the occupation of *Robert Drummond* opposite *Vauxhall* Turnpike to the middle of *Vauxhall Bridge*," thereby giving the Commissioners express

power and authority to light and keep lighted the road or street opposite *Vauxhall* Turnpike to the middle of *Vauxhall Bridge*. As *The Vauxhall Bridge Company* were already bound to keep the whole of their bridge and of this road lighted, under peril of an indictment if they did not, it is not easy to discover the object of the Legislature in including half of the bridge within the authority of the Commissioners in respect to the lighting. By the 54th section it was enacted that it should be lawful for the Commissioners to cause such of the streets as they should think proper to be lighted at such times and in such manner as they should think fit, and it was contended for the defendants that the terms of the 50th and of the 54th sections were such as not to make it imperative upon the Commissioners to light the half of *Vauxhall Bridge* at all, but that they might leave it to be lighted as it had been and was by the Bridge Company, who were bound by their Act of Parliament to do so; the Commissioners having, however, power by the Act to light the half of the bridge if they thought fit.

Considerable difficulty in putting a proper construction upon the Act in respect of the question in this case arises from the very peculiar wording of the 62nd section, by which it is enacted "that the *present* lamps, . . . and lamp-posts, &c., in the several streets and other places in or within the district or limits mentioned in this Act, and which shall or may hereafter be erected or fixed up by virtue of this Act," shall belong to and be the property of the Commissioners. At the time the Act took effect there could not have been any lamps or lamp-posts erected or fixed up by virtue of the Act, and it is difficult to understand what the Legislature meant by the

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expression "present lamps" in connection with the words that follow "and which shall or may hereafter be erected or fixed up by virtue of this Act." It may be that the Legislature intended by the terms they used to include only the lamps which had been already fixed up in the streets and places within the limits mentioned in the Act, by virtue of the Acts of Parliament mentioned in the recital and title to the 9 & 10 *Vict. c. cccl.*, and also lamps to be fixed up in future. If this was the intention of the Legislature, neither the lamps upon the bridge nor those upon the road leading to it, which had been erected by the Company on the lands of others adjoining to that road, would be vested in the Commissioners; but the Legislature may have intended that all existing lamps set up within the prescribed places and limits in the fulfilment of a public duty to set them up should become vested in the Commissioners. This, which would not be an unreasonable construction of the meaning of the Legislature by the terms used in the 62d section of 9 & 10 *Vict. c. cccl.* would vest the lamps and lamp posts on the half of the bridge and the road to *Vauxhall* Turnpike in the Commissioners, and would go far to shew that the Bridge Company would not be compellable to light the bridge, as they would have no right to meddle with lamps or lamp-posts which were vested in the Commissioners. No distinction can in this case be made between the obligation on the Bridge Company to light the road and the obligation to light the bridge; and, though it is by no means clear that the Legislature had such a state of things in their contemplation, we think that the language they have used is such as to vest the lamps fixed up by the Bridge

Company along the road, though not on their own premises, and the lamps on half the bridge, in the Commissioners, and thereby to disable the Bridge Company from lighting or interfering with them.

If the obligation to light half of the bridge was thrown upon the Commissioners, as we are disposed to think it was for the reasons we have given, the effect of The Metropolis Local Management Act (18 & 19 *Vict. c. 120.*) is to cast the duty of lighting the half of *Vauxhall* Bridge which is in the parish of *Lambeth*, as well as the road from the bridge towards the turnpike, on the vestry of that parish. By the 90th section of The Metropolis Local Management Act, all the duties, powers and authorities for or in relation to the lighting any parish mentioned in schedule (A) (*Lambeth* being one) or any part of such parish, which, at the passing of the Act, were vested in any Commissioners or in any other body than the vestry of such parish, are to be vested in and performed by the vestry of such parish; and by the 93d section all property, matters and things vested in such Commissioners or other body in connection with any such duties or powers are vested in the vestry of the parish. The Commissioners under the Act of 9 & 10 *Vict. c. cccl.* had power and authority by the 50th section to light the half of the bridge that was in the parish of *Lambeth*; and, as their powers and authorities are transferred to the vestry, it follows as a consequence that the vestry of *Lambeth* has power and authority to light the half of the bridge. The terms of the 90th section of the 18 & 19 *Vict. c. 120.* are indeed so comprehensive that it might well be contended that, even if the 9 & 10 *Vict. c. cccl.* had not transferred the obligation to light

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the bridge and the property in the lamps from the Bridge Company to the Commissioners, they would be transferred to the vestry of the parish from the Bridge Company; but we do not think it necessary to decide this, as we think they are transferred from the Commissioners to the vestry. By sect. 130 of the 18 & 19 *Vict. c. 120.* it is enacted that the vestry shall cause the several streets within their parish or district to be well and sufficiently lighted; and by the interpretation clause, sect. 250, the word "street" applies to and includes any bridge not being a county bridge (which the *Vauxhall Bridge* is not, by stat. 49 *G. 3. c. cxlii. s. 120.*)

It appears to us, putting the best construction we can upon these Acts of Parliament and the provisions in them, to which reference has been made, the effect of them is to transfer the obligation to light so much of the bridge as is in *Lambeth* to the vestry of that parish, and that the duty of lighting it imposed upon the Bridge Company by the 49 *G. 3. c. cxlii.* is transferred to the vestry of *Lambeth*, and there is no hardship or injustice in this, as the Bridge Company are liable to be assessed, and indeed are assessed, to a general rate for lighting the whole parish; and we therefore think that the Crown is entitled to our judgment.

Judgment for the Crown.

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BELASCO, appellant, HANNANT, respondent.

*Saturday,
June 28th.*

BARTON, appellant, HANNANT, respondent.

*23 & 24 Vict.
c. 27. s. 32.
Refreshment
houses.
"Knowingly
suffering
prostitutes to
assemble and
continue."
Conviction.*

By stat. 23 & 24 *Vict. c. 27. s. 32.* "every person licensed to keep a refreshment house under this Act who shall knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises" is liable to a penalty recoverable before justices. Upon an information under this section, a metropolitan police magistrate convicted the appellant, and, in a case stated for the opinion of this Court, found that prostitutes assembled on the premises of the appellant in furtherance of prostitution. The Court upheld the conviction.

Per *Blackburn J.* It would be sufficient to warrant a conviction if the magistrate found that prostitutes assembled as such.

BELASCO, appellant, HANNANT, respondent.

CASE stated, under stat. 20 & 21 *Vict. c. 43.*, by one of the Metropolitan Police Magistrates.

Upon the hearing of a summons against the appellant to answer the complaint of a superintendent of police for an offence under stat. 23 & 24 *Vict. c. 27. s. 32.* : "For that he, on &c., at the house &c., and within the Metropolitan Police District, being a person licensed to keep a refreshment house at &c., did knowingly suffer prostitutes to assemble at and continue in and upon his said premises" &c.; the magistrate found as follows: "That the business of the house kept by the appellant was carried on under a refreshment licence; that the ordinary usage of the appellant was to keep his house open from about midnight to four a. m., mainly for the purpose of providing refreshment for known prostitutes; that on the morning of the day in question, between the hours named, 155 prostitutes, and about an equal number of men, visited the house; that the attention

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of the defendant was called to the fact that the women present were prostitutes, and he admitted his knowledge of the fact; that, during the visits of the police, they (the police) saw numbers of prostitutes in the house who were not partaking of refreshment; that upon some occasions the police were kept waiting at the door, so that time was given to do away with all evidence of disorder or impropriety of conduct, if any such existed; that the said prostitutes entered the house kept by the appellant either singly or in groups and in the majority of cases they came out either in groups of men and prostitutes, or a man and a prostitute, in pairs; and that the *Haymarket*, close to which the defendant's house is situated, is one of the great centres of *London* prostitutes between midnight and four a. m., or thereabouts: finally, that not one of the prostitutes present was apparently needy or in distress; that the police discovered no trace of indecency, drunkenness or disorder in the said house; that it was a bona fide supper house; that a considerable number of suppers were actually served on the night in question; that it did not appear that those prostitutes who were not seen to take refreshment tarried in the house for a longer time than would have been needful to procure refreshment, had such been their intention; and that the said house was a fair sample of *Haymarket* supper houses used by the upper class of prostitutes of the district."

Upon these facts the magistrate found that the prostitutes did assemble at the house of appellant in furtherance of prostitution, and he convicted the appellant in the penalty of twenty shillings.

The question for the opinion of the Court was, whether,

upon finding these facts, the conviction was right in point of law ?

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Field, in support of the conviction.—By sect. 32 of stat. 23 & 24 *Vict. c. 27.*, for regulating the licensing of refreshment houses, “every person licensed to keep a refreshment house under this Act who shall knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises,” shall be liable to a penalty recoverable before justices. The conviction was warranted by the facts. In *Greig*, appt., *Bendeno*, respt. (a), which was a case upon an enactment in a local police Act containing almost the same words, the magistrate had dismissed the summons because there had been no disorderly conduct; and the Court held that the magistrate was not bound to convict; but they said that, if he inferred from prostitutes coming together that they in fact met for purposes of prostitution, or disorderly conduct, he ought to convict, whether there had been disorderly conduct or not. [He also cited *Parker v. Green* (b).]

Huddleston (*H. S. Giffard* with him), contra.—The facts found do not constitute an offence under stat. 23 & 24 *Vict. c. 27. s. 32.* It is not found that the appellant knowingly permitted the prostitutes to remain in or upon his premises. The licence for keeping a refreshment house, the form of which is given by the statute, Sched. No. 1, does not mention prostitutes, nor the continuing of persons of that character upon the premises. In *Greig*, appt., *Bendeno*, respt. (a), certain

(a) *E. B. & E.* 133.(b) *2 B. & S.* 299.

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Field was not called upon to reply.

BARTON, appellant, HANNANT, respondent.

CASE stated, under stat. 20 & 21 *Vict. c.* 43., by the same Metropolitan Police Magistrate.

Upon the hearing of a summons against the appellant for the same offence as in the preceding case, the magistrate found as follows: "That the appellant had for some time kept his house open under a refreshment licence, and that on the morning of the 19th *April* it was so kept open between the hours of 12 a.m. and 4 p.m.; that the police visited the house from half hour to half hour within the limits of time named; that upon each occasion they found numbers of known prostitutes assembled in a public room in the said house; that the largest number on any of the visits so made by the police were ninety-five women, nearly all of whom were known to be prostitutes; that no signs of refreshment, saving a few soda water bottles and coffee cups, were forthcoming on any occasion; that the prostitutes were all apparently belonging to the upper class of prostitutes; that the especial attention of the appellant was called to the fact that the women present during the visits of the police were prostitutes, and he admitted

his knowledge of the fact ; that many of the prostitutes seen by the police in the said public room were the same who had been seen on the occasion of their former visits during the said morning ; that about equal numbers of men and prostitutes were present in the said house during the said morning ; that the police were in many instances kept waiting whilst a bell was rung, and that an interval of about two minutes elapsed before they were admitted into the said public room ; and that no evidence was produced to shew that any refreshment was served in a bonâ fide way throughout the night ; that, on the other hand, there was no evidence of drunkenness, indecency or impropriety of conduct in the persons present at the said house on the said day."

On this evidence the magistrate found that the prostitutes assembled, and in some instances continued on the premises of the appellant in furtherance of prostitution ; and he convicted the appellant in the penalty of sixty shillings, it being his second offence.

The question for the opinion of the Court was, whether, upon finding these facts, the conviction was right in point of law.

Pigott Serjt., for the appellant.

Field was not called upon to support the conviction.

WIGHTMAN J. The question in both cases is, not whether the magistrate was bound to convict upon the evidence before him, but whether, the magistrate having convicted, the evidence warranted him in convicting. In this respect they differ from *Greig*, appt., *Bendeno*, resp. (a),

(a) *E. B. & E.* 133.

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where the magistrate had not convicted, and the question was, whether he was bound to convict under circumstances analogous to the present. The Court held that he was not ; but Lord *Campbell* said, p. 137, "It is not necessary, in order to bring a case within the Act, that there should be actual disorderly conduct ;" and *Erle J.* said, "If such women come together for the purpose of prostitution, or if thieves come together for their unlawful purpose, the magistrate has power to convict." And *Crompton J.* added, "I quite agree that upon the facts found to be proved, the magistrate was not bound to convict. He was bound to see whether the evidence satisfied him that the women came together for the purpose of prostitution or disorderly conduct. It is a pure question of fact for him : he was bound to convict if he thought they came for that purpose : and to that extent, perhaps, I should be disposed to qualify what I understood my Lord to say." In that case the Court held that the facts were consistent with the persons being in the house for the purpose of refreshment merely. There is no doubt that these unfortunate women are entitled to obtain reasonable refreshment ; but the question is, whether the appellant, under colour of keeping a bonâ fide supper house, did not convert it into a house of call for prostitutes. It would be a great encouragement to prostitution to hold that refreshment houses, in which were prostitutes so assembled, are not within stat. 23 & 24 *Vict. c. 27*. The terms of sect. 32 are, "knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises." The magistrate finds that prostitutes were in the habit of coming to the appellants' premises in great numbers, and that they all came there for the purpose of prostitution : that is the construction which I give to the words "in

furtherance of prostitution :'' though it is not a happy expression. He drew the inference that the appellants well knew that that they came there for the purpose of prostitution ; and that was a question for him. The magistrate finds a great many facts, the whole of which led him to the conclusion that the appellants had committed an offence within the Act ; and I think that there were circumstances enough proved before him to warrant him in coming to that conclusion in both cases.

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CROMPTON J. The question is, whether there was, in point of law, evidence sufficient to justify these convictions. The magistrate finds the facts, draws an inference from them, and then, in form, convicts the appellants. The statement of the magistrate consists of two parts, first, the facts which he found to be proved ; secondly, the inference which he drew from them. Looking at the facts found, I think there was evidence in both cases from which, in point of law, he was justified in drawing the inference which he did, that the appellants had committed an offence within stat. 23 & 24 *Vict. c. 27*.

BLACKBURN J. I also am of opinion that both convictions ought to be affirmed. The magistrate has convicted the appellants of knowingly suffering prostitutes to assemble and continue in and upon his premises, in the words of stat. 23 & 24 *Vict. c. 27. s. 32*. I agree that the mere fact that the women are prostitutes, or that the men are thieves, would not bring a case within the statute, because a number of prostitutes or thieves may assemble, yet it might not be an assembling of them as prostitutes or thieves ; but as soon as it appears that they meet upon the premises as such, to the

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knowledge of the keeper of the house, it is not necessary that prostitution, or burglary, or theft, should be actually planned at the time. The magistrate has found, and has stated the evidence upon which he has found, that the women assembled on the appellants' premises in furtherance of prostitution; that was more than he need have found. It would have been sufficient if he had found that they had assembled in the capacity of prostitutes.

Conviction affirmed in both cases.

Saturday,
July 12th.

County rate.
Borough.
15 & 16 Vict.
c. 81. s. 51.

The Mayor and Free Burgesses of the Borough of EAST LOOE, appellants, The Justices of the Peace for the County of CORNWALL, respondents.

The Mayor and Free Burgesses of the borough of *East Looe*, who were a corporation by prescription, received a charter from Queen *Elizabeth* confirming their ancient rights and privileges, and granting others. A further charter was granted by King *James* the Second, by which certain officers of the borough were to be justices of the peace in the borough, and were empowered to hold sessions of the peace, and to inquire of, hear, and determine whatsoever trespasses, misprisions, and other defects and articles within the borough committed, which the justices of the peace in any county might hear and determine; so that they did not proceed to the determination of any treason, murder, felony, or any matter touching the loss of life; with a non-intromittant clause to the justices of the county. Sessions had been regularly held by the borough justices; but no persons had been indicted or tried there, the practice being to send all offenders to the county gaol for trial at the assizes or sessions of the county; the only business done at the borough sessions being presentments for nuisances. The cost of maintaining the persons so committed had been sometimes paid out of the borough poor rate. The county justices had never exercised any jurisdiction in the borough, except in the custody and trial of prisoners sent to them by the borough justices; nor had the inhabitants of the borough ever been assessed to the county rate, nor had any rate in the nature of a county rate been levied in the borough. By stat. 15 & 16 *Vict. c. 81. s. 51.*, relating to the assessment of county rates, the word "county" shall, in the construction of that Act, mean and include any liberty, franchise, or other place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county at large in which such liberty, &c., may lie, nor contributing to the county rates for such county: Held, that the borough of *East Looe* was within the definition given in that section, and therefore was not liable to be assessed to the rate for the county at large.

ON appeal against the basis or standard for a county rate for *Cornwall*, the following special case was stated for the opinion of this Court, pursuant to stat. 12 & 13 *Vict. c. 45. s. 11.*

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The appellants have been an ancient corporation from time immemorial, and in the year 1588 (29 *Eliz.*) received a charter from Queen *Elizabeth*, confirming their ancient rights and privileges, and granting others. By this charter they were, amongst other things, to have a common gaol, to appoint a mayor, to elect a recorder, and to have and hold a Court of record for civil causes.

A further charter was granted by King *James I.*, in the 30th year of his reign, confirming and extending the charter of *Elizabeth*, and containing, amongst other things, the following clauses: "And further, we will and by these presents, for us, our heirs and successors, do grant to the aforesaid mayor, and to the free burgesses of the borough aforesaid, and to their successors, that the mayor, recorder and last predecessor of every mayor of the borough aforesaid for the time being for ever shall be justices of us, our heirs and successors, for the preserving and keeping the peace of us, our heirs and successors, within the borough aforesaid, the liberties and precincts thereof, for the keeping and causing to be kept all ordinances and statutes for the good of our peace and for the preservation thereof, and for the quiet rule and government of us, our heirs and successors, mentioned in all their articles in the aforesaid burgess-ship, the liberties and precincts thereof, according to the virtue, form and effect of the same statutes and ordinances, and to do all other things which do belong to the office of a justice of our peace in any county within this our kingdom, and to chastise and punish all that shall offend against the form

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of their ordinances and statutes, or any of them, in the borough aforesaid, according to the form of ordinances and statutes that they have or shall have; and that the said mayor, recorder and last predecessor of every mayor of the borough aforesaid for the time being, or any two of them, (of whom the mayor and recorder of the borough aforesaid for the time being, we will that he be one), be justices of us, our heirs and successors, to inquire by the oath of honest and legal men of the borough aforesaid, by whom the truth of the thing may be better known, of all and all manner of felony and other evil acts and offences concerning which the justices of our peace, our heirs and successors, may lawfully inquire, or ought by any manner of ways inquire after those things that shall be so committed within the said borough, liberties and precincts thereof; so notwithstanding they do not proceed to the determining of any treason, murder or felony, or any other offence touching the loss of life or member without the special licence of us, our heirs and successors.

“ And furthermore, we will and by these presents, for us, our heirs and successors, do grant to the aforesaid mayor and free burgesses of the borough aforesaid and their successors, that the mayor and recorder and last predecessor of every mayor of the borough aforesaid for the time being, or any two of them (of whom the mayor and recorder of the borough aforesaid for the time being we will that he be one), by their warrant sealed and to be sealed with their hands subscribed, can and may send all such persons who hereafter shall be taken, arrested, attached or found within the borough aforesaid, liberties and precincts of the same, for treason, murder, felony, manslaughter or robbery done or to be done, or for suspicion of felony, to the common gaol of our county of

Cornwall aforesaid, in that place to be stayed to be tried, and to answer for their offences before the justices of us, our heirs and successors, in the said county, or before the justices assigned or to be assigned to hear and determine: willing, and by these presents for us, our heirs and successors, commanding, as well the sheriffs of the county of *Cornwall* aforesaid, as the common keeper of the gaol of the same county for the time being, that they and every of them upon such warrant by the aforesaid justices of the peace within the borough of *East Looe* for the time being, or any two of them (of whom the mayor and recorder of the borough aforesaid for the time being we will that he be one), to be directed to them, or any of them, all such persons as aforesaid, [who] by the said justices of the peace within the said borough hereafter shall be taken, arrested, attached or found within the borough aforesaid, liberties and precincts thereof, for treason, murder, homicide, robbery or any other felonious act, or for suspicion of felony, to be sent to the said common gaol of *Cornwall* as is aforesaid, that they receive and take into safe custody, and keep in the same place to be tried, and to answer before the justices of us, our heirs and successors, to hear and to determine, or the justices assigned or to be assigned to deliver the gaol of our said county of *Cornwall*; and these letters patent, or their enrolment, shall be a sufficient warrant and discharge in this behalf for the sheriffs of this county aforesaid, and keepers of the common gaol of the county of *Cornwall* aforesaid for the time being."

In 1685 a further charter was granted by King *James II.*, upon the surrender of the previous charter, granting, amongst other things, a common gaol, and power to appoint a mayor and recorder, and the following clause is contained in the last mentioned charter:—

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"And furthermore, our will and pleasure is, and for us, our heirs and successors, by these presents, we grant to the said mayor and free burgesses and their successors that the mayor and recorder of the borough aforesaid for the time being, and their successors for ever, and also every mayor of the said borough during one year after he shall depart from the office of mayor of the borough aforesaid for ever, in future times shall and may be respectively justices of the peace of us, our heirs and successors, in the said borough of *East Looe*, and the liberties and precincts of the same, and also to preserve and keep and correct the statutes of artificers and labourers, of weight and measure, within the borough aforesaid, the liberties and precincts of the same, to be done, kept and corrected.

"And that the said mayor and recorder for the time being and the said mayor during one year after he shall depart from the office of mayor, or any of them, shall and may have full power and authority for ever hereafter to hold the Sessions of the peace twice by the year: to wit, one time within a month after the feast of *St. Michael the Archangel*, and the other time within a month after *Easter*, yearly and every year, to inquire, hear and determine of whatsoever trespasses, misprisons and other defects and articles whatsoever within the borough aforesaid, the precincts and liberties of the same, done, moved, or committed, which before the keeper or justices of our peace in any county in this our kingdom of *England*, by the laws and statutes of the same kingdom, shall and may be able to inquire, hear and determine: so that the said mayor and recorder and justices of the peace for the said borough for the time being, and their successors, may not by any manner hereafter proceed to the determination of any treason,

murder, felony, or any matter touching the loss of life within the borough aforesaid, the circuits and precincts of the same, without the special command of us, our heirs and successors, and notwithstanding they shall and may be able to hear, inquire, perform and determine all and singular other trespasses, offences, defects and articles which to the office of justice of the peace within the borough aforesaid belongs to be done, as fully and wholly and in such ample manner and form as any other justices of the peace of us, our heirs and successors, in any county or counties of our kingdom of *England*, shall or may be able to inquire, hear or determine; so that the justices in no manner hereafter may any way intrude themselves or any one of them may intrude himself to anything belonging or appertaining to the office of justice of the peace within the borough of *East Looe*, and the bounds and precincts of the same, by any cause whatsoever arising or happening there, without the special command of us, our heirs and successors, in that behalf obtained."

Under the provisions of the last mentioned charter, justices of the peace have been appointed and acted in and for the borough of *East Looe*.

Sessions under such charter have been regularly held, but no prisoners have been indicted or tried for any offences at such Sessions; the practice having been to send all offenders to the county gaol, for trial at the Assizes or Sessions of the county. The only business done at the borough Sessions has been presentments by the grand jury for nuisances, not followed by any indictments.

A building called the gaol for the borough, consisting of two rooms, has been kept and maintained by and at the expense of the appellants, in which offenders have

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been temporarily confined until they were sent to the gaol of the county for safe custody until their trial at the Assizes or Sessions for the county. No other use has been made of such building. The justices of the peace in and for the county of *Cornwall* have never, save as appears by this case, exercised any jurisdiction in the borough until the borough was included in the present basis for a county rate, the subject-matter of the present appeal.

The borough of *East Looe*, under the before mentioned charters, returned two members to the Commons House of Parliament until the passing of the Reform Act, 2 & 3 W. 4. c. 45., which Act included the borough in schedule (A.)

The borough has never (until the present cause of appeal arose) been assessed, rated, or in any way contributed to the county rate, nor has any rate in the nature of a borough or county rate been assessed or made in the borough.

Persons charged with felony and misdemeanor committed within the borough have been committed by the borough justices to the county gaol for trial at the county Assizes or Sessions, and the costs of the maintenance of persons so committed have on some, but not on all occasions been charged to the borough. In general the borough has paid these charges out of the borough poor rate (the parish of *St. Martin*, in which the borough is situate, having a separate rating), but in one instance, where an arrear had been allowed to accumulate, the borough did not pay.

No separate Court of Quarter Sessions of the Peace has been granted to the borough since the passing of The Municipal Corporations Act, 5 & 6 W. 4. c. 76.

A committee of justices for *Cornwall*, for the purpose

of preparing a basis or standard for county rates, under the provisions of the 15 & 16 *Vict. c. 81.*, was appointed in 1858. The inhabitants of the borough of *East Looe* attended a meeting of such committee, appointed for the purpose of receiving objections to such standard or basis, and denied the liability of the inhabitants of the borough to be assessed to county rates, and protested against the jurisdiction of the county justices. The county justices, however, included the borough of *East Looe* in the basis or standard for county rates.

The following is an extract from such basis for the county rates :

“COUNTY OF CORNWALL.

“*Basis or Standard for the County Rate*

“Prepared by the county rate committee appointed under the statute 15 & 16 *Vict. c. 81.*, intituled ‘An Act to consolidate and amend the statutes relating to the assessment and collection of county rates in *England* and *Wales*,’ and allowed and confirmed by the justices assembled at the General Quarter Sessions of the Peace, held at *Bodmin*, in and for the said county, on the 19th day of *October*, 1858.

Borough or Parishes.	Value for General Rate.	Rate at 1-8th of a farthing.	Value of portion of Parish liable to Police Rate.	Rate at 1-8th of a farthing.
<i>East Looe.</i>	1456 0 0	£ s. d. 0 3 9½	1456 0 0	£ s. d. 0 3 9½

“*Coode*, Clerk of the Peace.”

It was agreed that, if the Court should be of opinion that the inhabitants of the borough of *East Looe* were not liable to be assessed to the county rates for *Cornwall*, then the basis or standard was to be amended by striking out from it the borough of *East Looe* as set out in the

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above extract ; otherwise the standard or basis to stand confirmed, save that as to the amount mentioned as to "Value for general rate," the inhabitants should not hereafter be precluded from appeals for the purpose of shewing that such value is or may be excessive.

The case was argued, *June 28th* : before WIGHTMAN and MELLOR JJ., BLACKBURN J. being present during a part of the argument.

Kinglake Serjt. (H. Bullar with him), for the appellants.—The justices of the county have no power to assess the inhabitants of the borough of *East Looe* to the county rate under stat. 15 & 16 *Vict. c. 81. Sect. 21* empowers them "to assess and tax every parish, township and other place, whether parochial or extra-parochial, within the respective limits of their commissions ;" which is the same language as occurs in stats. 12 *G. 2. c. 29. s. 1.*, 13 *G. 2. c. 18. s. 7.*, 55 *G. 3. c. 51. s. 1.* [He also referred to stats. 12 *G. 2. c. 29. s. 5.* and 55 *G. 3. c. 51. s. 24.*] But the borough of *East Looe* is not within the limits of the commissions of the county justices, being taken out of their jurisdiction by the non-intromittant clause in the charter ; and it is a place in which a rate in the nature of a county rate may be levied, being itself a "county" within the definition given in stat. 15 & 16 *Vict. c. 81. s. 51.* which enacts that "the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county or counties at large in which such liberty, franchise, or place may lie, nor contributing or paying to the county rates made for such county or counties at large."

In *Weatherhead v. Drewry* (a) it was held that, by virtue of stat. 13 G. 2. c. 18. s. 7., a high constable might be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county of itself. [He also cited *Rex v. The Justices of Berwick upon Tweed* (b).] In *Rex v. Clarke* (c), which will be relied on by the other side, it was held that the city of *Bath* was liable to the county rate because the city justices had not jurisdiction co-extensive with that possessed by the county justices, and therefore the jurisdiction of the county justices was not taken away by the proviso in stat. 55 G. 3. c. 51. s. 1. But in *Mercer v. Davis* (d) it was held that a rate in the nature of a county rate might be imposed by the justices of the borough of *Maidstone*, in which, as in *East Looe*, the county justices have no jurisdiction. And *Bayley J.*, p. 624, pointed out that the case of *Rex v. Clarke* was very different; "for there the city justices had jurisdiction as to some matters only, and the county justices retained their power and jurisdiction as to others." The decision in that case was adopted in *Rex v. Shepherd* (e). In *Rex v. Hayward* (f) the charters of the borough did not contain a non-intromittant clause. In *Reg. v. The Justices of Wilts* (g) it was held that the borough of *Marlborough*, which, before The Municipal Corporations Act, 5 & 6 W. 4. c. 76., was exempt from county rates under stat. 55 G. 3. c. 51., according to the doctrine laid down in *Rex v. Shepherd* (e), became subject to them by virtue of sects. 1 and 111, of stat. 5 & 6 W. 4.

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(a) 11 *East*, 168.(c) 5 *B. & A.* 665.(e) 2 *A. & E.* 298.(b) 8 *B. & C.* 327. 334.(d) 10 *B. & C.* 617.(f) 6 *A. & E.* 590.(g) 11 *Q. B.* 758.

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c. 76., that being one of the boroughs in Schedule (B.). But *East Looe* is not one of those boroughs, and is not affected by the provisions of that statute.

Montague Smith (*Kingdon* with him), for the respondents.—The borough of *East Looe* is within the limits of the commissions of the county justices; and therefore, by stat. 15 & 16 *Vict. c. 81. ss. 2. & 21.*, the county justices have power to levy a county rate within it, unless it is taken out of their jurisdiction by the definition of the word “county” in the interpretation clause, sect. 51. [He referred to the form of the commission set out in 3 *Burn’s Justice*, by *Bere* and *Chitty*, p. 988.] The non-intromittant clause does not take the borough out of the limits of the commissions of the county justices, otherwise they could not try felons. [*Wightman J.* The borough is within the limits of their commissions, but they must not go into it for certain purposes.] The words “within the respective limits of their commissions” refer to divisions of counties, such as the *Isle of Ely*, and exclusive jurisdictions, such as *Romney Marsh*, and cities which are counties of themselves. [*Wightman J.* Why should not the Legislature have said “within counties or divisions of counties”?]]

All former statutes relating to the assessing and collecting of county rates were repealed by stat. 15 & 16 *Vict. c. 81. s. 1.*; and most of the previous decisions, which are not consistent with each other, were on particular words in the proviso in sect. 1, and on sect. 24 of the repealed statute, 55 *G. 3. c. 57. Rex v. Clarke* (a) is an authority for the respondents. [*Crompton J.* In that case the county justices had sessional power within the city of *Bath*.] In *Rex v. Shepherd* (b), which was

(a) 5 *B. & A.* 665.

(b) 2 *A. & E.* 298.

decided on the words in the proviso to sect. 1 of stat. 55 G. 3. c. 51., Lord *Denman*, delivering the judgment of the Court, p. 311, said that the construction adopted in that case was not consistent with the expressions used by Lord *Tenterden* and *Bayley J.* in *Rex v. Clarke (a)*; but he added, "this case does not admit of a decision, owing to the mixed and incongruous circumstances whereof it is composed, without conflicting with some previous opinion." In *Mercer v. Davis (b)* the charter of the borough of *Maidstone* gave the borough justices no power to commit prisoners to the county gaol. *Bayley J.*, p. 623, puts his decision on the fact that the borough had an exclusive jurisdiction of the peace, and *Parke J.*, p. 626, observes, that "in *Bath*, the county justices had, as to some matters, concurrent jurisdiction with the city justices, and in others they might act on default of the city justices."

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According to the balance of the cases a rate in the nature of a county rate could not be levied in the borough of *East Looe* under the repealed statute, 55 G. 3. c. 51.; and therefore it is not within the description of a "county" in sect. 51 of stat. 15 & 16 Vict. c. 81.

Kinglake Serjt. replied.

Cur. adv. vult.

CROMPTON J. read the following judgment.

The question in this case is whether the inhabitants of the borough of *East Looe* are liable to be assessed to the county rate.

The mayor and free burgesses of the borough of *East Looe* are a corporation by prescription, but appear to have been regulated by two charters, which are referred to in the case, one in the reign of Queen *Elizabeth*, and

(a) 5 B. & A. 665.

(b) 10 B. & C. 617.

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the other, which is the governing charter, in the reign of King *James II.*, the latter of which charters contains a non-intromittant clause as regards the justices of the peace of the county; certain officers of the borough are by the charter to be justices of the peace in the borough and may hold Sessions of the peace, and may inquire of, hear and determine whatsoever trespasses, misprisions and other defects and articles within the borough committed which the justices of the peace in any county might hear and determine, so that they did not proceed to the determination of any treason, murder, felony, or any matter touching the loss of life within the borough.

Sessions have been regularly held by the borough justices, but no persons have been indicted or tried there, it having been the practice to send all offenders to the county gaol for trial at the Assizes or Sessions of the county, the only business done at the borough Sessions being presentments for nuisances. The cost of maintaining the persons so committed has been sometimes paid by the corporation out of the borough poor rate, but they have not always paid such expense. The county magistrates have never interfered or exercised any jurisdiction in the borough, except in the custody and trial of the prisoners sent to them by the borough justices, nor have the inhabitants of the borough ever been assessed to the county rate, nor has any rate in the nature of a county rate been levied in the borough.

The county justices however now, for the first time, included the borough of *East Looe* in the basis for a county rate under the provisions of the 15 & 16 *Vict.* c. 81.

By the 21st section of the Act the county justices may assess and tax every parish, township, and other

place within the respective limits of their commissions; and by sect. 2 they may appoint a committee to prepare a basis or standard for a county rate according to the annual value of the property rateable to the relief of the poor in every parish, township, borough, or place within the limits of the justices' commissions. By the 51st section it is enacted that "the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of county rates *may be* levied, having a separate commission of the peace, and not subject to the jurisdiction of the county or counties at large in which such liberty, franchise, or place may lie, nor contributing or paying to the county rates made for such county or counties at large."

The borough of *East Looe* seems to fall within the description of a liberty, franchise, or place that would itself be meant by and included in the word "county" as defined by that section. It is a place in which, although no rates in the nature of county rates have been levied hitherto, there appears no reason, and none has been suggested, why they should not be levied; it has a separate commission of the peace; it is not subject to the jurisdiction of the county at large, by reason of the non-intromittant clause in the charter; and it has never contributed or paid to the county rates made for the county at large.

If we are right in this, *East Looe* is a place not liable to be assessed to the county rate for the county at large, being a place in which a rate in the nature of a county rate may be levied, and being itself a county within the definition given in the 51st section of the Act.

Several cases were cited upon the argument, which it is not very easy to reconcile; but we think that the cases

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of *Weatherhead v. Drewry* (a), *Mercer v. Davis* (b) and *Rex v. Shepherd* (c), as far as they are applicable to cases arising under the recent statute 15 & 16 Vict. c. 81., tend to support the view of the subject that we are disposed to take. And we think that, upon consideration of the provisions of that statute, referred to upon the argument, no sufficient ground has been shewn for altering the state of things that has hitherto existed with respect to the borough of *East Looe*, or for including it within the general county rate to which it has never hitherto been assessed; and our judgment therefore is that *East Looe* is not liable to be assessed to the rate for the county at large.

Judgment for the appellants.

(a) 11 *East*, 168.

(b) 10 *B. & C.* 617.

(c) 2 *A. & E.* 298.

Saturday,
July 12th.

*Money had
and received.
Privity of
contract.
Failure of
consideration.
Cheque.*

WATSON against RUSSELL.

1. Where a party, by means of a false pretence or a promise or condition which he does not fulfil, procures another party to give him a note or cheque or acceptance in favour of a third, to whom he pays it, and who receives it *bonâ fide* for value, the giver remains liable on the note, &c.; because his acceptance imports value and liability *primâ facie*, and he can only relieve himself from his promise to pay the holder by shewing that he is not holder for value, or that he received the instrument with notice or not *bonâ fide*.

2. The defendant chartered a ship to *K.* at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, *K.* received from the plaintiff, through whom he had sub-chartered the ship to *B.*, a cheque for half the amount due, payable to the order of the defendant, upon the terms that *K.* should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. *K.* paid the cheque to the defendant; but omitted to inform him of the terms on which it had been given, and he had no notice of them; and, the remainder of the money being unpaid, the defendant, who had obtained cash for the cheque, stopped the ship: Held,

Per *Crompton, Blackburn and Mellor JJ.*, that an action for money had and received to recover the amount of the cheque was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by *K.*

Per *Cockburn C. J.*, that the plaintiff was entitled to recover back so much of the amount of the cheque as no consideration had been given for, in consequence of the defendant having stopped the ship.

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THIS was an action for money had and received,
 interest, and on accounts stated.

Plea. Never indebted.

Issue.

The cause was tried before *Hill J.*, at the *Liverpool*
 Spring Assizes, 1861, when the plaintiff was nonsuited,
 with leave reserved to move to enter a verdict for him.

In *Easter* Term, 1861,

Brett obtained a rule nisi accordingly.

In *Easter* Term, 1862, *May* 8,

Milward shewed cause.

Brett and *Burnie* were heard in support of the rule.

The case fully appears in the judgment of the Court.
 No authorities were cited.

Cur. adv. vult.

The following judgments were now delivered by
 CROMPTON J., sitting alone.

CROMPTON J. The Court is divided in opinion on
 this case.

I shall first read my own judgment, in which my
 brothers BLACKBURN and MELLOR concur.

In this case the plaintiff, who was a shipbroker at
Liverpool, sued the defendant, also a shipbroker there,
 to recover the amount of a cheque for 60*l.*, drawn by
 the plaintiff, payable to the order of the defendant,
 and remitted to him by a person of the name of *Keys*,
 under the following circumstances.

The defendant, by authority of the owner, had, on the

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16th *November*, 1860, by a charter-party of that date, let and chartered to *Keys* a ship called *The Martje Flors*, which ship *Keys* hired for a period of six calendar months from the day the ship should be placed at his disposal. *Keys* agreed to take the ship, with her captain, &c., and to retain the same as long as the charter party should continue in force, and to pay "as hire for the said ship at and after the rate of 30*l.* sterling, per week, to be paid every four weeks in advance, the first payment of 120*l.* to be made on the vessel being placed at charterer's disposal." The vessel to be re-delivered in *London* at the expiration of the charter-party. The charter-party also contained a clause enabling the defendant in case of default to withdraw the ship from the employment of *Keys*. The first sum of 120*l.* was paid on the 19th *November*; and the second payment of 120*l.*, for the four weeks ensuing, became due on the 17th *December* following. The money was not paid on that day, and in consequence the defendant, on the following day, the 18th, sent a telegram to plaintiff as follows: "I consider you have vitiated the contract by not paying the money in advance as per charter-party. I have no objection, however, to receive it, if remitted by to-night's post;" to which *Keys* replied "I will remit charter money on *Friday*." On the 19th defendant wrote to *Keys*, protesting against the delay, concluding thus, "Unless the money be remitted forthwith, I shall consider it expedient, in the interest of my principals, to stop the ship." *Keys* had, through the plaintiff, effected a sub-charter of the ship to Messrs. *Barnes*; and, not being able to remit the money due to the defendant, he applied to the plaintiff for some assistance, who then gave him the cheque in question, dated 22nd *December*, 1860, drawn on Messrs. *J. Barnes & Co.* for 60*l.* payable to the order

of the defendant, but on the terms that he was to inform the defendant, by the letter enclosing the cheque, that it was given "in consideration that '*The Martje Flors*' should perform the charter and go to *Gibraltar* and back."

The cheque was forwarded to the defendant by *Keys* in the following letter of 22d *December*, 1860:—"I unexpectedly returned this evening too late for bank hours; consequently could not send you a draft. Enclosed you have a cheque for 60*l.*, which will pay the charter up to *Monday* next: the end of next week I will send you 60*l.* more."

This letter and cheque were not received until the 24th *December*, and on that day the defendant telegraphed to *Keys*, "As you have only remitted a portion of money due, I have telegraphed to *Chester* to stop '*The Martje Flors*,' holding you liable for consequences:" and by post of the same day sent to *Keys* a letter reciting the above telegram, and containing the following:—"I have shewn you more leniency in the matter than you have a right to expect. Now of course you will take your choice either to make regular remittances according to charter party or have the vessel stopped, for I am determined to protect the interest of my friends." On the day of the date of that letter, and in reply to the telegram which preceded it, *Keys* telegraphed to the defendant, "If you stop '*The Martje Flors*' I will hold you liable for consequences," &c.; to which the defendant replied as follows: "Since writing my first of this day's date, I have received your telegram. In all cases, however, I shall not allow the vessel to move until the charter money is paid. It is your fault, not mine, that she has stopped."

Between the date of the charter and the 22d *December*, *Keys* had employed the ship in carrying cargoes between different places, but she never went to *Liverpool* after the

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22d *December*, although, at the time the cheque was given by the plaintiff to *Keys*, she was hourly expected to arrive there.

At the trial, Mr. *James* objected that the action was not maintainable, there being no privity between the plaintiff and the defendant, the advance having been made by the plaintiff to *Keys*; to which it was answered, by Mr. *Brett*, that the cheque was advanced on a special condition, which *Keys* had violated, and that no property in the cheque passed to the defendant.

The learned Judge nonsuited the plaintiff, giving Mr. *Brett* leave to move to enter a verdict for the plaintiff for the amount of the cheque.

Upon this state of facts I think that the nonsuit was right.

Assuming that *Keys*, as between himself and the plaintiff, acted improperly and without authority in paying the cheque to the defendant, still if the defendant was the holder of it for value and without notice, that is, if he received it bonâ fide for a valuable consideration, he would have had a right to sue the now plaintiff upon it.

If *A.*, by means of a false pretence or a promise or condition which he does not fulfil, procures *B.* to give him a note or cheque or acceptance in favour of *C.*, to whom he pays it, and who receives it bonâ fide for value, *B.* remains liable on his acceptance. His acceptance imports value and liability primâ facie, and he can only relieve himself from his promise to pay *C.* by shewing that *C.* is not holder for value, or that he received the instrument with notice or not bonâ fide. The instrument is one which *C.* has a right to take, relying on the acceptance or making of the party, and it is no answer to say that there is no consideration as

between him and the acceptor or maker, if the holder took it bonâ fide for value.

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But it was said that in the present case the consideration failed either in whole or in part.

It appears, however, that the defendant had a right to receive 120*l.* from *Keys*, and had been pressing him for it.

This sum had been due some time before the receipt of the cheque. It was, indeed, for a forehand payment for the hire of the ship, which, by the contract, was to be in the possession of *Keys*, as appears from the engagement of *Keys* to redeliver it. Some part of the time for which the forehand hire was to be paid had expired, and it seems from the correspondence that the defendant did not, as was suggested, put an end to the contract of demise before or at the time of receiving the cheque. I cannot draw any such inference of fact as would enable me to say that the rule to enter a verdict should be made absolute on this ground. On the contrary, it appears from the letters and telegrams of the 24th *December* that, when the defendant received the cheque, neither he nor *Keys* contemplated an entire rescission of the contract or demise. It seems from the defendant's letters that he intended to let the ship go if the whole of the forehand hire were paid, and that he was detaining her till *Keys* should perform his contract by paying the remainder of the charter money due.

When the defendant received the cheque, and when he cashed it, he was a holder for value, and had clearly a right to the cheque and the cash. He took the note, as the jury found, without notice, and he took it for a good consideration in part payment of the 120*l.* then actually due on the contract. He says, and perhaps was entitled to say, "I will not let the vessel go till you pay me the rest of what is due;" but, even if he subse-

1862. quently broke his contract with *Keys*, or wrongfully

WATSON took the possession of the vessel from *Keys*, the remedy
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RUSSELL. would be by an action by *Keys*, and not by the present
 plaintiff, who was properly nonsuited ; and this rule must
 therefore be discharged.

I will now read the judgment of my LORD CHIEF JUSTICE.

COCKBURN C. J. I concur in thinking that the plaintiff is not entitled to recover back the amount of his cheque on the ground of its having been transferred to the defendant by the party to whom it was given in disregard of the terms on which alone the latter was justified in using it.

I consider the law to be now quite settled that if a person puts his name to a paper, which either is, or by being filled up or indorsed may be converted into, a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder, for consideration and without notice, such party is liable to such bonâ fide holder, however fraudulent, or even felonious, as against him, the transfer of the security may have been.

And in this respect there can be no difference between a bill of exchange and a cheque, which, substantially, is the same thing as a bill of exchange, although, by the custom of bankers, the preliminary of acceptance is dispensed with.

It follows, from the rule of law to which I have referred, that a party thus rendered liable by the wrongful transfer of a negotiable security to which he has put his name, cannot, after the amount has been paid, recover it back in an action for money had and received. To allow such an action to succeed would

obviously be to defeat and abrogate the rule in question, which is now too firmly settled to be questioned.

Nevertheless, I am of opinion that to the extent of 30*l.* the plaintiff is entitled to our judgment.

While agreeing in the rule of law as I have above stated it, I take it, on the other hand, to be equally clear that the holder of a negotiable security thus wrongfully transferred can only recover on proof of having given consideration for it; and that whatever, in an action between the immediate transferor of the security and the holder, would be available as a defence, is equally available to the original party, if sued on the security. Thus, if the intermediate party, instead of absolutely parting with the note, had deposited it with the holder as security for half its amount, or, having parted with it on condition of receiving a given sum for it, had received only half the amount agreed upon; as, in an action against him to recover the full amount, it would have been open to him to resist *pro tanto* the demand; so, if an action were brought against the original party, the same facts would be, in like manner, *pro tanto*, a defence to him.

It appears to me to follow that if a cheque is wrongfully transferred and cashed, without consideration having been given for it to the full amount, the maker of the cheque, not having been liable to the full amount, will be entitled to recover back the excess in an action for money had and received to his use.

Applying this doctrine to the present case, I am of opinion that the plaintiff is entitled to our judgment for 30*l.*, on the ground that the defendant had only given consideration to that extent for the cheque. By the terms of the contract, the sum of 30*l.* a week was to be paid for the hire of the ship, each four weeks' hire to be paid in advance on the first of the month. Now, it

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appears that, a new month having been entered upon, the charterer, instead of paying the four weeks' hire in advance, waited till the end of the first week, and, being then pressed for immediate payment by the defendant, instead of paying the 120*l.*, sent to him the plaintiff's cheque for 60*l.*, promising to send the other 60*l.* in the course of a short time.

Under these circumstances, the defendant who by the terms of the charter was entitled to put an end to the contract, informed the charterer that he should stop the ship, and accordingly did so, at the same time cashing the plaintiff's cheque without returning the 30*l.*, which would only be due in respect of the ensuing week.

By stopping the ship, and depriving the charterer of the possession and the use of her, I am of opinion that the defendant put an end to the contract; and, it appearing to me clear that he could not do this and at the same time take the hire of the ship for the coming week, I am of opinion that the retaining of the 30*l.* was wrongful on his part, and that he held the same in trust for whosoever was entitled to it, namely, the plaintiff. The cheque having been wrongfully applied by *Keys*, the plaintiff would have been entitled to have it restored to him on satisfying the holder in respect of any claim he had upon it; and the defendant, having appropriated the excess of the proceeds of the cheque, is, in my opinion, liable for such excess to the plaintiff in the present action.

Rule discharged.

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PARKER appellant, BOUGHEY respondent.

Wednesday,
July 2d.

An order for payment made by a justice of the peace, under The Loan Society Act, 3 & 4 *Vict. c. 110.*, must be for *immediate* payment; he has no jurisdiction to order payment in a certain time from making the order.

Loan Society.
3 & 4 *Vict.*
c. 110.
Order for
payment.
Justice of the
peace.

CASE stated for the opinion of this Court by two justices of the peace, under stat. 20 & 21 *Vict. c. 43.*

At a petty Sessions, holden at *Tunstall*, in the county of *Stafford*, on the 13th *February*, 1862, a complaint preferred by *Ralph Parker* on behalf of *The Potteries and Newcastle Loan Society* (hereinafter called the appellant), against *Samuel Boughey* (hereinafter called the respondent), under sect. 16 of the stat. 3 & 4 *Vict. c. 110.*, charging for that he *Samuel Boughey* had failed to make payment of certain instalments amounting to 4*l.* 1*s.* 6*d.*, being part of a loan of 7*l.* 10*s.*, secured by a certain note entered into by him and *John Griffiths* and *Thomas Smith*, to the treasurer for the time being of the Society, dated the 16th *February*, 1861, was heard and determined, and upon such hearing the respondent was ordered to pay to the appellant the said sum of 4*l.* 1*s.* 6*d.* in six months from the time of making such order.

Upon the hearing of the complaint it was proved, on the part of the appellant, and found as a fact, that the respondent had failed to make payment of the instalments, amounting to 4*l.* 1*s.* 6*d.* It was contended, on the part of the appellant, that the justices had not power to order payment at a future time (to wit, in six calendar months), but that they were bound by stat. 3 & 4 *Vict. c. 110. s. 16.*, to order payment forthwith.

The justices, however, being of opinion that they had

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power to order payment at such future time as aforesaid, gave their determination in the manner before stated.

The question of law for the opinion of the Court was, whether the order was valid.

M' Mahon, for the appellant.—This case turns on stat. 3 & 4 *Vict. c. 110.*, entitled “An Act to amend the laws relating to Loan Societies.” Sect. 16 enacts that “all notes signed for the repayment of such loans shall be made payable to the treasurer for the time being of the Society, and may be in the form given in the Schedule to this Act annexed marked (A), or to the like effect ; * * * and if the party liable to pay the same shall fail to make full payment in money of the sum in the note mentioned, or any part thereof, after demand in writing, &c.,” he may be summoned before a justice of the peace, who “shall thereupon proceed to hear and determine the said complaint, and award such sum to be paid by the person thereunto liable to such treasurer as aforesaid as shall appear to such justice to be due thereon, without any rebate of interest, together with such a sum for costs, not exceeding the sum of 5*s.*, as to such justice shall seem reasonable. * * * ; and if any person shall refuse or neglect to pay the sum of money which shall be so adjudged to be due upon such note and costs as aforesaid, upon the same being demanded in manner aforesaid,” the justice may issue his warrant to levy the same by distress, &c. The form of the note given by Schedule (A) says, “On any default in the punctual repayment of the instalments, or other breach of the conditions on which the loan was granted as set forth in the enrolled rules, we jointly and severally promise to pay, on demand, to the treasurer

aforesaid, at the office aforesaid, so much of the loan as shall not then have been repaid." And the form of warrant of distress given by Schedule (C) says, Whereas the said, &c., "did fail to make full payment in money to the treasurer of the said Society, of the sum of pounds shillings and pence, being part of the sum of pounds lent and advanced to and secured by note bearing date * * * : These are therefore, to command you to levy the said sum of pounds shillings and pence &c." The jurisdiction of the justice is limited to deciding whether the money is due, and in that event he must order immediate payment; but he has no power to direct payment to be suspended. Here the justices have allowed six months for payment, and if they can do that they might on the same principle allow any greater number. One of the conditions of the note in Schedule (A), according to which and according to sect. 16 the note must be made, is that "on any default in the punctual repayment of the instalments, or other breach of the conditions on which the persons to whom loans are made under the Act undertake to pay what is *then* due." [He also referred to sects. 21 and 23.]

The Court then called on

Holl, contra.—The language of sect. 16, that the justice shall have power to "award such sum to be paid by the person thereunto liable to such treasurer as aforesaid as shall appear to such justice to be due thereon, without any rebate of interest, together with such a sum for costs, not exceeding &c., as to such justice shall seem reasonable," shews that it was intended to invest the justice with a discretionary power to award payment immediately or at a future time.

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1862. CROMPTON J. For aught I can see the justices had
 PARKER no more right to allow the party six *months* for repay-
 v. ment than six *years*.
 BOUGHET.

WIGHTMAN J. The whole frame of the Act shews that the order for payment is to be for immediate payment.

BLACKBURN J. concurred.

Order quashed, and case remitted to the justices to make a proper order.

Wednesday,
 July 2d.

THE QUEEN *against* ST. MARY, ISLINGTON,
 Middlesex.

*Pauper
 lunatic.
 Relief.
 Irremove-
 ability.
 16 & 17 Vict.
 c. 97.
 9 & 10 Vict.
 c. 66.*

1. The expence of the maintenance &c. of a pauper lunatic above the age of sixteen in a lunatic asylum, under 16 & 17 *Vict. c. 97.*, is not relief given to its parent, so as to prevent the parent acquiring, under 9 & 10 *Vict. c. 66.*, a status of irremoveability by residence in a parish during that time.

2. *Quere*, if the child were under the age of sixteen ?

AT the Quarter Sessions for *Middlesex*, holden on the 28th *October*, 1861 : on an appeal against an order of two justices for the county of *Middlesex*, made on the 5th *June*, 1861, adjudging the settlement of *Sarah Wing*, a pauper lunatic, then confined in the lunatic asylum at *Hanwell*, for that county, to be in the parish of *St. Mary, Islington*, in that county, and ordering the guardians of the poor and the churchwardens and overseers of the poor of that parish to pay to the churchwardens and overseers of the poor of the parish of *St. Pancras* the amount of expences of the examination of *Sarah Wing* and her conveyance to the asylum, and of her lodging, maintenance, medicine,

clothing and care incurred within twelve calendar months previous to the date thereof, and also to pay to the treasurer of the asylum a weekly sum of 9s. 11d. for her future lodging, maintenance, medicine, clothing and care in the asylum ; the Quarter Sessions confirmed the order, subject to the following case.

The lunatic, *Sarah Wing*, is the lawful child of *Elizabeth Wing*, and was born on 24th *May*, 1840. She has never become emancipated, and has no other settlement than that of her mother, which is admitted to be in the parish of *St. Mary, Islington*. *Elizabeth Wing*, on the 20th *May*, 1854, being then a widow, came to reside in the parish of *St. Pancras*, where she continued to reside up to the present time, maintaining herself and her children, except as hereinafter mentioned.

On the 9th *May*, 1855, *Sarah Wing*, having become insane, was admitted into the workhouse of the parish of *St. Pancras*, and was, on the 9th *June*, 1855, sent by an order of a justice, in pursuance of the statute, as a pauper lunatic, to a lunatic asylum, and was maintained there, as a pauper lunatic, until the 17th *October*, 1855, when she was discharged as cured. Upon her discharge she returned home to her mother in *St. Pancras*, and remained there until the 11th *April*, 1856, when, having become again insane, she was admitted into the workhouse, and was, on the 22d *April*, 1856, sent by an order of a justice, in pursuance of the statute, as a pauper lunatic, to a lunatic asylum, and was maintained there as a pauper lunatic until the 5th *May*, 1858, when she was again discharged as cured. Upon her discharge, she returned home to her mother in *St. Pancras*, and remained there until 5th *September*, 1858, when, having become again insane, she was admitted into the workhouse, and was, on the 17th *September*,

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1862. 1858, sent, by an order of a justice, in pursuance of the statute, as a pauper lunatic, to a lunatic asylum, and was maintained there as a pauper lunatic until the 27th November, 1860, when she was again discharged as cured. Upon her discharge she returned home to her mother in *St. Pancras*, and remained there until 10th April, 1861, when, having become again insane, she was admitted into the workhouse, and was, on the 13th April, 1861, sent, by an order of a justice, in pursuance of the statute, as a pauper lunatic, to a lunatic asylum, where she is now confined. On the 5th June, 1861, the order appealed against was made, adjudging the settlement of the lunatic to be in *St. Mary, Islington*, and directing that parish to pay the expences incurred in and about her conveyance to the asylum, and her maintenance there since the 13th April. When *Sarah Wing* was admitted into the *St. Pancras Workhouse* she was made chargeable as an inhabitant of that parish, and her admission there was made necessary because her mother was not able to keep her under proper care and control. So long as she was sane she was not in want of any parish relief, and her mother never actually received any relief on her own behalf, or on behalf of the said *Sarah Wing*.

On the trial of the appeal it was contended by the appellants that *Sarah Wing* was a person who, at the time of her being conveyed to the asylum, on the 13th April, 1861, if not a lunatic, would have been exempt from removal to the parish of her settlement by reason of 9 & 10 *Vict. c. 66.* and 11 & 12 *Vict. c. 111.*; that the mother of the lunatic, having resided for more than five years in *St. Pancras*, was irremovable, and that no portion of the time during which the lunatic was in the *St. Pancras Workhouse* or in the lunatic asylums

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ought to be deducted in computing the five years' residence of the mother, or at any rate that no portion of the time after 24th *May*, 1856, when *Sarah Wing* attained the age of sixteen, ought to be so deducted.

It was contended on behalf of the respondents that, as *Sarah Wing* was unemancipated, it must be taken that her mother was receiving relief during all the time she, *Sarah Wing*, was in the workhouse and asylums as aforesaid, and that, after deducting that time from the actual residence, the mother had not resided for five years, within the meaning of the statutes, when the lunatic was conveyed to the asylum on the 13th *April*, 1861, and that the respondents ought not to maintain the lunatic under 16 & 17 *Vict. c. 97. s. 102.*

The question for the opinion of the Court is, whether the time during which *Sarah Wing* was maintained and confined in the workhouse and asylums before the 13th *April*, 1861, is to be deducted in computing the five years' residence of the mother.

If this Court shall answer the question in the affirmative, the order of 5th *June*, 1861, and the order of Sessions are to stand confirmed; if in the negative, those orders are to be quashed on the ground of the irremovability of *Sarah Wing*.

The order of the justices was made under "The Lunatic Asylums Act, 1853," 16 & 17 *Vict. c. 97.*

Sect. 95. "When any pauper lunatic is confined under the provisions of this Act he shall, for the purposes of this Act, be chargeable to the parish from which, or at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other

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parish, or that it cannot be ascertained in what parish such lunatic is settled ; and every pauper lunatic who is chargeable to any parish shall, whilst he resides in an asylum, registered hospital, or licensed house, be deemed for the purposes of his settlement to be residing in the parish to which he is chargeable.”

Sect. 96. Justices of the peace may make orders upon the officers of unions and parishes for the maintenance of pauper lunatics.

Sect 97. And may inquire into and adjudge the settlement of pauper lunatics, and order payment of maintenance, &c., accordingly.

Sect. 102. “ Provided always, that all the expenses incurred since, &c., or hereafter to be incurred, in and about the examination, bringing before a justice or justices, removal, lodging, maintenance, medicine, clothing, and care of a pauper lunatic heretofore or hereafter removed to an asylum, registered hospital, or licensed house, under the authority of this or any other Act, who would, at the time of his being conveyed to such asylum, hospital, or house, have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision” in the 9 & 10 *Vict. c. 66.*, “ shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption if such parish be subject to a separate board of guardians, or by the overseers of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any union the same shall be paid by the guardians, and be charged to the common fund of such union so long as the cost of the relief of paupers rendered irremoveable by the last mentioned Act shall continue to be chargeable upon the common funds of unions ; and no order shall be made under any provision contained in

this or any other Act upon the parish of the settlement in respect of any such lunatic pauper during the time that the above mentioned charges are to be paid and charged as herein provided :” and ends by repealing 12 & 13 *Vict. c. 103. s. 5.*

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Le Breton, for the respondents.—Relief to the lunatic was relief to her mother, so that the time during which the lunatic received relief in the workhouse and the asylums should be deducted from the residence of the mother in the parish of *St. Pancras* ; after which deduction five years would not remain, and consequently no status of irremovability under 9 & 10 *Vict. s. 66.* was acquired by her. This appears from the course of legislation on the subject.

The 43 *Eliz. c. 2. s. 7.* enacted that “the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person,” &c. By 4 & 5 *W. 4. c. 76. s. 56.*, “All relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf and dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be ; and any relief given to or on account of any child or children under the age of sixteen of any widow, shall be considered as given to such widow : Provided always, that nothing herein contained shall discharge the father and grandfather, mother and grandmother of any poor child, from their liability to relieve and maintain such poor child” &c.

Sect. 57. “Every man who from and after &c. shall

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marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be charged with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this Act, be deemed a part of such husband's family accordingly."

Sect. 58. "Any relief, or the cost price thereof, which shall be given to or on account of any poor person above the age of twenty-one, or to his wife, or any part of his family under the age of sixteen, and which the said Commissioners shall by any rule, order or regulation declare or direct to be given or considered as given by way of loan, and whether any receipt for such relief, or engagement to repay the same, or the cost price thereof, or any part thereof, shall have been given or not by the person to or on account of whom the same shall have been so given, shall be considered and the same is hereby declared to be a loan to such poor person."

9 & 10 *Vict. c. 66. s. 1.* enacts: "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant: Provided always, that the time during which such person shall be a prisoner &c., or shall be confined in a lunatic asylum, or house duly licensed, or hospital registered for the reception of lunatics, &c., or during which any such person shall receive relief from any parish, &c., shall for all purposes be excluded in the computation of time hereinbefore mentioned, and that

the removal of a pauper lunatic to a lunatic asylum, under the provisions of any Act relating to the maintenance and care of pauper lunatics, shall not be deemed a removal within the meaning of this Act: Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable."

11 & 12 *Vict. c. 111.* substituted the following proviso for the second in the preceding Act: "That whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

The circumstance of the lunatic being above the age of sixteen makes no difference: for whatever the age of a child, so long as he continues part of the family, and contracts no relation inconsistent with his being such, he is unemancipated, and relief to him is relief to the head of the family; and in practice such children are always removed when their parents are removed. Carrying out this view, an idiot is always looked on as a minor, and not emancipated; *Rex v. The Inhabitants of Much Cowarne (a)*, *Reg. v. The Inhabitants of St. Mary Arches, Exeter (b)*.

There is no express authority on the question before the Court. In *Rex v. The Inhabitants of Mile End Old Town (c)*, the point was raised, but not decided.

(a) 2 B. & Ad. 861.

(b) 1 B. & S. 890.

(c) 4 A. & E. 196; 5 M. & N. 581.

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1862. In *Walton v. Spark* (a), which was an action of debt on a bond conditioned to save a parish harmless from *John G.*, his wife and children, *John G.* had a son *Joseph G.* who had a wife and children; and the Court said, "Here the wife and children of *Joseph* are part of his family, and relief for them is relief for him, for he is bound by the laws of God and nature to provide for them, and therefore he might become impotent by the charge of his children." In *Reg. v. The Inhabitants of Barnsley* (b), counsel, arguing a case on stat. 4 & 5 W. 4. c. 76. s. 56., said, "Here the son is thirty-three years old"; on which *Coleridge J.* asked, "Do you say that, if a lunatic of advanced age is living with his father, and relieved by the parish because the father cannot maintain him, the father is not chargeable?" [He also cited *Reg. v. The Inhabitants of Shavington cum Gresty* (c).]

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Poland, for the appellants.—What was done here was not relief to the mother of the lunatic within the meaning of the poor laws; seeing that the lunatic was placed in the workhouse and asylums solely for the benefit of the public, and not with the view of affording assistance to the mother, who was able to take care of herself. If this were otherwise, a parent who has a lunatic child might never be able to obtain a status of irremovability. Stat. 8 & 9 Vict. c. 117. s. 2. enacts, "If any person born in *Scotland* or *Ireland*, or in the *Isle of Man*, or *Scilly*, or *Jersey*, or *Guernsey*, not settled in *England*, become chargeable to any parish in *England* by reason of relief given to himself or herself, or to his wife, or to any illegitimate or bastard child, such per-

(a) *Comberb.* 320.

(b) 12 Q. B. 193. 199.

(c) 17 Q. B. 48; 20 L. J. M. C. 194.

son, his wife, and any child so chargeable, shall be liable to be removed respectively to *Scotland, &c.*:" the Legislature never could have meant that a man was to be removeable to *Scotland, Ireland, &c.*, because one of his children was lunatic and he was unable to maintain it. The case shews that the lunatic was not under proper care and control; and it is consistent with the facts that she may have been found wandering about the streets by a constable, and taken to the workhouse. If she had been brought to a private lunatic asylum, the parent could not be charged for her if she were beyond the age of nurture. The 4 & 5 *W. 4. c. 76. s. 56.* in its terms speaks only of children under sixteen, and the 9 & 10 *Vict. c. 66.* does not say that relief given to any of the family, emancipated or not, of a person shall prevent his acquiring the status of irremoveability. [*Blackburn J.* What then is the meaning of the exception in the former Act, "Not being blind or deaf and dumb"?] It was to avoid the hardship of rendering parents removeable because they happened to have a child afflicted actu Dei.

Walton v. Spark (a), which is relied on by the other side, is also reported in *Skinn.* 556, nom. *Waltham v. Sparkes*, from which it appears that the question was whether "grandchildren" came within the words of a bond to hold the parish harmless against a man, "his wife and children." [He cited *Rex v. The Inhabitants of Mile End Old Town (b).*]

WIGHTMAN J. If there had been any case on this point, the industry of the counsel on both sides would have furnished us with it.

On the best construction I can put on the statutes it

(a) *Comberb.* 320.

(b) 4 *A. & E.* 196; 5 *N. & M.* 581.

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appears to me that this pauper lunatic was not removeable.

The case comes within the second proviso in the first section of 9 & 10 *Vict. c. 66*. [His Lordship read the proviso.] Here the pauper lunatic was living with her mother, and no doubt was only removeable if the mother was. But then it is said the mother was removeable by reason of the maintenance of her daughter in the workhouse and lunatic asylums by the parish of *St. Pancras*, in which she resided, which would constitute relief to the mother. Now the child is above the age of sixteen, and the question therefore arises whether parish relief (assumed for the purposes of the case to have been given), given to a child above sixteen, is relief to its mother so as to make the mother removeable, or at least to oblige her to deduct from the term of five years which would otherwise confer on her a status of irremoveability the time during which that relief was given.

Looking at the terms of the 4 & 5 *W. 4. c. 76. s. 56.*, it seems to me that relief to this child is not to be taken into account as against the mother in determining the question whether the latter is removeable. The terms are, "all relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf and dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be." That seems a legislative provision as to what shall be the age up to which such relief must be given. And its meaning amounts to this, that relief within that age shall be considered as relief to the father or mother, consequently leading to the inference that similar relief to a person of greater age would not have that effect. I find no exception in any statute, nor has it been

decided that there is a difference in the case of a lunatic above the age of sixteen, (who is not blind, or deaf and dumb,) so as to make relief to him equivalent to relief to the father or mother. The present question was indeed touched on in *Rex v. The Inhabitants of Barnsley* (a), but did not directly arise.

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CROMPTON J. I am of the same opinion.

On reading this case it proves (like all others relating to lunatic paupers) of a puzzling nature. Mr. *Le Breton* brought it to a clear point, and I thought the case should be decided in his favour, until I heard the argument of Mr. *Poland* and considered the statute.

The question clearly turns on the 56th section of The Poor Law Amendment Act, 4 & 5 W. 4. c. 76., because, as the case was presented to us by Mr. *Le Breton*, the mother was chargeable by the relief given to the child by its having been kept in the workhouse and lunatic asylums, and he urged that those periods would have to be deducted from the time during which the mother was to gain her status of irremovability.

What Mr. *Poland* said struck me (although we need offer no opinion upon it), that this may possibly have been a compulsory keeping of the child in the lunatic asylum, and if so, it might be a hardship on a parent who could keep his child at home if he were to be held chargeable for such expenses as these (b). That certainly might be a hardship, but the parish might nevertheless say, though it is your misfortune, still we were bound to pay this money and did pay it for you. But that

(a) 12 Q. B. 193. 203.

(b) In *Reg. v. The Overseers of St. George, Bloomsbury, T. T.*, June 6, 1863, it was decided that the maintenance of a wife in a lunatic asylum, by the parish from which she was sent there, was relief to her husband so as to prevent him from acquiring irremovability.

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question does not arise here, because the point depends on the stat. 4 & 5 *W.* 4. c. 76. s. 56., which my Brother *Wightman* says is a legislative exposition of the matters which shall make persons chargeable. We all know there was a time when a person might be removed from a parish on the ground, not that he was, but that he might become, chargeable.

Let us come therefore to stat. 4 & 5 *W.* 4. c. 76. s. 56. The object of that enactment is chargeability for the purpose of removal. We need not consider whether the child were lunatic or not, but look on this as simply relief given to the child. I think this statute has the effect of defining in what cases the parent shall be considered as chargeable for the purpose of an order of removal by relief given to his children, and its design, as appears from its language, evidently was to make the parent chargeable for children under sixteen only.

I do not think that the case of *Walton v. Spark* (a) is any direct authority on the present point. In *Reg. v. The Inhabitants of Barnsley* (b), Mr. Justice *Coleridge*, a great authority, asked a question involving the present point, but it did not arise there; nor was it decided in *Rex v. The Inhabitants of Mile End Old Town* (c).

BLACKBURN J. I am of the same opinion. I agree with my Brothers *Wightman* and *Crompton*, that the case has been extremely well argued on both sides, and thanks are due to the counsel, who, where so much puzzle has arisen from a number of statutes, have brought the question to an intelligible point.

The lunatic pauper here, being above sixteen years of age, was still part of her mother's family, and therefore,

(a) *Comberb.* 320; *Skin.* 556.

(b) 12 *Q. B.* 193.

(c) 4 *A. & E.* 196; 5 *N. & M.* 581.

according to all recent decisions, not removeable under 9 & 10 *Vict. c. 66.* unless the mother was removeable. Now, the mother resided in the parish of *St. Pancras* for more than five years, and there is nothing to exempt any portion of that time from the five years requisite to confer on her a status of irremoveability unless she comes within the exception in stat. 9 & 10 *Vict. c. 66.*, which exempts from its operation the time during which a person "shall receive relief from any parish." The fact here was that the mother was not receiving relief from the respondent parish, but her lunatic child, above the age of sixteen years, was in a lunatic asylum receiving support (I will not beg the question by saying *relief*) from it. A question has been raised which we do not mean to decide. We do not say whether mere support of a lunatic child under sixteen would or would not be relief to the parent; but assuming, for the purpose of the argument, that if, under sixteen, it would be relief to the parent, the question is, whether relief to a child above sixteen, being part of the family, is within the 9 & 10 *Vict. c. 66.*? And that depends on the consideration whether it would be relief to the parent for any other purpose.

Mr. *Le Breton* argued that the lunatic child was part of the family,—therefore that the parent was bound to support her; and consequently that relief to the child while thus part of the family was relief to the parent. I was for a short time deceived by that ingenious argument. But I think that, before stat. 4 & 5 *W. 4. c. 76.*, the question whether this was relief or not could only depend on 43 *Eliz. c. 2. s. 7.*, which says, "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient

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ability, shall, at their own charges, relieve and maintain every such poor person, &c." Under that enactment the mother was bound here (perhaps whether the child were lunatic or not) to support it if it became poor, in the same manner as the child would be bound to support the parent under like circumstances. But it could not be said under that section that relief to the parent would render the child removeable because it was bound to support the parent. The case of *Walton v. Spark* (a), when looked at, is not an authority for that. The point contended for there (I think the report in *Comberbach* must be taken to be the correct one (b), for it makes the pleadings, &c., consistent,) was that the bond was not forfeited by *Joseph* the son receiving relief from the parish, seeing that he could support himself, and only came on the parish because he had a wife and children who required support; to which the Court answered that relief to the man's children was relief to him, for he might become impotent by the charge of his wife and children, whom he was bound to support.

There is therefore no ground for saying that, before stat. 4 & 5 W. 4. c. 76., relief to the family of a poor person was relief to the poor person himself. Now when sect. 56 of that Act comes to be looked at, no one can reasonably doubt that the persons who drew it (and who must have been persons of great experience) did not suppose that relief to a child under sixteen (or perhaps even if above that age) was relief to the head of the

(a) *Comberb.* 320.

(b) *Waltham v. Sparkes*, *Skin.* 556, and *Walton v. Spark*, *Comberb.* 320, seem to be reports of the same case in different stages. The former is entitled as of *M. 6 W. 3. M.*, and concludes by saying that the Court took time to consider, and that it was afterwards adjudged for the plaintiff. The latter seems to be the adjourned case, and professes to be of *P. 7 W. 3.*

family. Here relief is given to a child *above* sixteen, though a member of the family, and therefore clearly does not come within it. And, consequently, if this would not have been relief before the statute, it is not relief now.

The last case on the point is that of *Reg. v. The Inhabitants of St. Mary Arches* (a), according to which, as well as the other cases, the removeability of a family depends on its head. Here the mother never received relief, therefore her lunatic child is not removeable either.

Our judgment therefore must be for the appellants.

CROMPTON J. Lord *Campbell's* judgment in *Reg. v. The Inhabitants of Shavington cum Gresty* (b) seems to agree with that which we have formed. Speaking of stat. 4 & 5 W. 4. c. 76. s. 56., he says: "That section, it is true, enacts that relief to the children shall be considered as relief to the parent; but that is not meant to prevent the relief being considered as given to the children also; the intention of the clause was to make the parent removeable in respect of such relief as much as in respect of relief actually and immediately given to the parent."

Judgment for the appellants.

(a) 1 B. & S. 890.

(b) 17 Q. B. 48, 51; 20 L. J. M. C. 194.

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ST. MARY,
ISLINGTON.

[1860.]

[Monday,
November 5th.]BAMFORD *against* TURNLEY.*Nuisance.**Action.**Locality.**Reasonable use
of defendant's
land.**"Brick kiln."*

1. An action lies for a nuisance to the house or land of a person, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law; and this whatever the locality may be where the act complained of is done; and where, on the trial of such an action, it appears that the act complained of was done on the land of the defendant, the jury cannot properly be asked whether the causing of the nuisance was a reasonable use by the defendant of his own land: per *Erle C. J.*, *Williams* and *Keating JJ.*, *Bramwell* and *Wilde BB.*, reversing the decision of the Queen's Bench; *Pollock C. B.* dissentiente.

2. In an action for a nuisance arising from the burning of bricks on the defendant's land near to the plaintiff's house, it appeared that the defendant's land and the land upon which the plaintiff's house stood were portions of an estate which had been sold in lots as building land; and in the particulars it was stated that there was abundance of brick earth and gravel, which, with other advantages, presented an advantageous opportunity of carrying out safe and profitable building operations. Bricks had previously been made on the spot where the plaintiff's house stood. The judge directed the jury, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict: held erroneous: per *Erle C. J.*, *Williams* and *Keating JJ.*, *Bramwell* and *Wilde BB.*, reversing the decision of the Queen's Bench; *Pollock C. B.* dissentiente.

THE first count of the declaration stated that the plaintiff was possessed of a messuage and dwelling house and premises, with the appurtenances, situate at *Norwood*, in the county of *Surrey*, in which he dwelt, with his family and servants: and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made certain brick kilns upon certain land of the defendant adjoining and near to the messuage and dwelling house and premises of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks in the brick kilns, and caused noxious and unwholesome vapours, smokes, fumes, stinks and stench to raise and proceed from the brick kilns, and to enter in, spread and diffuse themselves over, upon, into, through and about

the messuage and dwelling house and premises of the plaintiff, and the air over, through and about the same was thereby greatly impregnated and filled with the said noxious and unwholesome vapours, fumes, stinks and stenches, and was rendered and became and was corrupted, offensive, unwholesome, unhealthy and uncomfortable : and thereby the plaintiff had been greatly annoyed and inconvenienced in the possession and enjoyment of his messuage and dwelling house, and also, by means of the corrupt, unwholesome and unhealthy state of the air in and over and about the plaintiff's dwelling house so occasioned, the plaintiff and his family and servants became and were sick and ill, and so continued for a long time, and the plaintiff had necessarily incurred a great expense in and about obtaining necessary medical advice, and was otherwise greatly injured and prejudiced.

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The second count of the declaration complained of a similar nuisance by the defendant's placing a quantity of decomposed ashes and bones in the immediate neighbourhood of the plaintiff's house.

The only material plea to both counts was Not guilty, upon which issue was joined.

On the trial, before *Cockburn* C. J., at the Summer Assizes at *Guildford*, 1860, it appeared that in the month of *June*, 1857, some land at *Norwood*, part of the *Beulah Spa* Estate, was offered for sale in lots by public auction, in accordance with certain printed particulars and conditions of sale. The particulars were headed "Particulars of the first section of the *Beulah Spa* Estate, consisting of about fifty acres of Freehold Building Land, &c., in nineteen lots," and stated, among other things, that the property presented "splendid sites for the erection of first class villas"; and it was added

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“There is abundance of brick earth and gravel, which, combined with all the other advantages appertaining to this exceedingly beautiful property, present an unusually advantageous opportunity of carrying out safe and profitable building operations.” Capt. *Edward Strode*, the brother in law of the plaintiff, in the year 1857 purchased lot 11 of this property containing 2 a. 1 r. 33 p. and built a residence thereon. The house was finished in the year 1858, and shortly afterwards the plaintiff became the tenant of the house and property. The defendant was a solicitor in *London*, and in the year 1858 he bought some other lots of the same property under the same particulars and conditions, being respectively lots 1, 10, 14 and 16. It was proved that building was going on in the neighbourhood, the plaintiff’s house being within ten minutes walk of the new railway station at *Norwood*. It also appeared that, during the preceding year, bricks had been burnt at certain spots in lots 13 and 15, and at a spot adjoining to lot 15. It further appeared, that during the last seventeen or eighteen years, bricks had from time to time been burnt at various parts of the field, of which the site of the clamp in question then formed part, such field having been divided at the time of the sale into various lots. It also appeared that bricks had previously been made on the spot where the plaintiff’s house stood.

In the month of *June*, 1860, the defendant, with the view of burning bricks made out of the brick earth found upon his land and thereby obtaining bricks to build upon it, erected a clamp of bricks on lot 16, at a distance of 180 yards from the plaintiff’s house. It was proved that there was an annoyance to the plaintiff arising from the erection and use of the clamp as complained of in the first count sufficient *primâ facie* to constitute a cause of action; but it was also proved that the erection and use of the

clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling houses on his own land; and that the clamp for burning the bricks was placed on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily resulted from the burning of bricks; and the question was whether, under the circumstances so proved, an action could be maintained in respect of such annoyance.

The Lord Chief Justice intimated that the case came within the principle laid down in *Hole v. Barlow* (a), and directed the jury, upon the authority of that case, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict upon the first count, independent of the small matter of whether there was an interference with the plaintiff's comfort thereby. Upon this ruling a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set it aside, if the Court should be of opinion that the above ruling of the Lord Chief Justice was erroneous.

Upon the second count, a verdict was by arrangement entered for the plaintiff, with 1*s.* damages, but no question arose on that count.

In the following *Michaelmas* Term,

Petersdorff Serjt. moved for a rule calling upon the defendant to shew cause why a verdict should not be

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damages.

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Per CURIAM. (COCKBURN C. J., WIGHTMAN, HILL
and BLACKBURN JJ.)

Rule refused, with leave to appeal.

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Saturday,
July 12th.

IN THE EXCHEQUER CHAMBER.

BAMFORD *against* TURNLEY.

For head note, see ante, p. 62.

THE plaintiff having appealed against the above decision, a case setting forth the facts was stated, and concluded as follows :—

“If the Court should be of opinion that, upon the facts as stated, the ruling of the Lord Chief Justice, founded upon the decision of *Hole v. Barlow*, was erroneous, the verdict found for the defendant on the first count is to be set aside, and a verdict entered for the plaintiff instead thereof with 40s. damages.

“If the Court should be of a contrary opinion, the verdict entered for the defendant upon the first count is to stand.”

The case was argued, in *Easter Vacation*, May 14th, before ERLE C. J., POLLOCK C. B., WILLIAMS and KEATING JJ., and BRAMWELL and WILDE BB.

Mellish (with him *Petersdorff* Serjt. and *Garth*), for the plaintiff.—There is no material distinction between the facts in this case and those in *Hole v. Barlow* (a);

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but it has been found at Nisi prius most difficult to apply that decision, and this Court will not affirm it.

A convenient and proper place for erecting a brick kiln must be a place where it will not be a nuisance to any person. It lies on the other side to shew what is the extent of the exception to the common law rule that a person may not lawfully erect anything even on his own land which will materially disturb his neighbour in the enjoyment of his. It may be that for the sake of trade in towns, or for the public benefit, a nuisance is sometimes justified, such as a tallow chandler's factory ; but the nuisance in the present case was created by the defendant for a private purpose, viz., burning bricks for building a house for himself, and the extent of advantage or convenience to the defendant cannot justify the creation of such a nuisance to the plaintiff. The only question is whether there is a real substantial injury to the plaintiff, he being supposed to be of ordinary character and nerves, and with reference to the state of the neighbourhood.

The Court in *Hole v. Barlow* (a) refer to 1 *Com. Dig., Action upon the Case for a Nuisance* (C.), where it is said that an action upon the case does not lie "for a reasonable use of my right, though it be to the annoyance of another ; as, if a butcher, brewer, &c. use his trade in a convenient place, though it be to the annoyance of his neighbour." But no authority is cited by Chief Baron *Comyns* ; and, in order to understand this dictum, it is necessary to refer to the instances in which he says the action for a nuisance lies. Thus, he says, *Id.* (A.), the action lies "for a nuisance to the habitation or estate of another," for which he cites autho-

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rity: "So, if a man erect anything offensive so near the house of another, that it becomes useless thereby; as a swine sty," "Or a lime kiln," "Or a dye-house," "Or a tallow furnace. But if he be a chandler, *quære*." And then he says, *Id.* (C.), "But an action upon the case does not lie upon a thing done to the inconvenience of another; as, if a man erect a mill near to the mill of another; whereby the other loses part of his profit; where the former mill is not *a tempore cujus contrar. &c.*" "If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies." But a lawyer has no more right than another person. [*Pollock*, C. B. There is no foundation for that distinction. *Erle* C. J. The degree of nuisance is always a question for the jury.] But in the present case the way of leaving the question to the jury was wrong, for it is no justification of a nuisance that it is a reasonable use of the defendant's land. [*Wilde* B. Suppose a man builds upon his land a house which excludes the light from his neighbour's windows.] No right to light is acquired until twenty years' enjoyment; whereas a man has a right to pure air as soon as his house is built. [*Wilde* B. A man has only a right to reasonably pure air.] There are numerous cases in which, if there had been such a rule as is contended for by the defendant, it would obviously have been relied on. In the earliest case (a), cited in *Gale on Easements*, 279, 280, which was a writ of "Quod permittat" against the defendant for building a lime kiln near the plaintiff's house, though, as was said in *Aldred's Case* (b), "the building of a lime kiln is good and profitable," it was not suggested that an action would not lie

(a) *Assis.* 4. fo. 6 b. pl. 3.(b) 9 *Co.* 57 a., 58 b., 59 a.

if it was built in a convenient place. In *Aldred's Case* (a) there was no question as to any reasonable right of the defendant to have the hog sty near the plaintiff's house. [Pollock C. B. In the first case it was alleged that the smoke from the lime kiln entered the plaintiff's house, "so that no man could dwell there;" and in *Aldred's Case* the declaration alleged that the plaintiff and his servants could not remain in the house without danger of infection from the hog sty.] In *Jones v. Powell* (b) *Hide* C. J. said a tan house was necessary, for all persons wear shoes; nevertheless it may be pulled down if it be erected to the nuisance of another. In *Rex v. Pierce* (c) it was held that the trade of a soap boiler, though such a trade was honest, and might be lawfully used, could not be carried on to the annoyance of the neighbourhood. In *Walter v. Selfe* (d) *Knight Bruce* V. C. granted an injunction under circumstances very similar to those in the present case. In 1 *Rol. Abr.* 89, pl. 7, *Action sur Case* (N.) *Nusans, Poynton v. Gill* is cited, which was an action on the case against the defendant for raising the chimney of a lead smelting house near the close of the plaintiff, so that the grass and trees of the close were corrupted by the smoke from the chimney, and thereby the plaintiff lost the grass and trees, and also two horses and a cow which were depasturing in the close; and it was held that though the trade was legal, and for the benefit of the public and necessary, the action lay, because the trade might be carried on in waste places, and large commons remote from inclosures, so that no loss or damage would arise from it to the owners of adjoining land. [He also

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(a) 9 Co. 57 a.

(b) *Palm.* 536. 539; *S. C. Hutt.* 135.(c) 2 *Show.* 327.(d) 4 *De G. & Sm.* 315, affirmed on appeal; see *Id.*, p. 326.

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cited *Anon. (a)*.] In actions for corrupting watercourses it has never been alleged that the convenience of the defendant is to be considered. [*Pollock C. B.* Water in the smallest degree corrupted is rendered useless for domestic purposes. Causes of action have arisen, as in *Priestley v. Fowler (b)*, which nobody in *Westminster Hall* dreamed of: why may not defences to this class of actions arise as we become more familiar with the exigencies of society?] It is for the public advantage that no nuisance be committed; and landowners and others, interested in works which are injurious to their neighbours, will find means of avoiding the creation of nuisances.

The cases in which the doctrine that a person who comes to a nuisance has no right of action, which is found in 2 *Bl. Comm.* 402, was exploded, are in favour of the plaintiff. [He cited *Bliss v. Hall (c)*, per *Tindal C. J.*] [*Williams J.* In 16 *Vin. Abr.* p. 27, *Nusance, G.* pl. 18, in the margin, it is said: "Where there has been an antient brewhouse time out of mind, although in *Cheapside* or *Fleet Street*, &c. this is not any nuisance, because it shall be supposed to be erected when there were no buildings near; contra, if a brewhouse should be now erected in any of the streets or trading places; this shall be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly in an action brought by one *Robins* a laceman in *Bedford Street* against a brewer for a nuisance from the brewhouse to the goods in his shop (it being a brewhouse of ten years' standing), the jury gave for two years damages 60*l.* *L. P. R. Nusance*, 246, cites *Trin. 8 W. 3, C. B. Robins's Case.*"]

(a) 1 *Ventr.* 26.

(b) 3 *M. & W.* 1.

(c) 4 *Bing. N. C.* 183. 186; *S. C.* 5 *Scott*, 500. 504.

The exception laid down for the first time in *Hole v. Barlow* (a) was not recognized in *The Stockport Water Works Company v. Potter* (b).

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Lush (with him *Honyman*), for the defendant.—The decision in *Hole v. Barlow* (a) was approved by *Martin* and *Channell* BB. in *The Stockport Water Works Company v. Potter* (b). There are essential differences between the present case and *The Stockport Water Works Company v. Potter*: in that case, the nuisance was permanent and injurious to health by corrupting the water of a public stream with poisonous compounds, and there was no evidence that the defendants took any precautions to prevent the nuisance from their calico printing works. In the present case, the plaintiff and defendant stand in a peculiar relation to each other as purchasers of adjoining plots of ground, both of which were laid out and purchased as building ground, and one inducement held out to the purchaser was, that there was abundance of brick earth. There is no proposition of law that every person has an absolute right to pure unadulterated air under all circumstances: on the contrary every person must enjoy his own property subject to the inconvenience necessarily resulting from the reasonable use by his neighbour of his own land. That explains the dicta that what is a nuisance in one place may not be so in another, and that whether a thing is a nuisance or not depends on the state of the neighbourhood. There is no authority against the ruling in *Hole v. Barlow* (a), which, in substance, involves the above proposition. In 1 *Roll. Abr.* 89, pl. 7, *Action sur Case* (N.) *Nusans*, the smoke from the smelting house was destructive to

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(b) 7 H. & N. 160.

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 v. that the new brewhouse and privy were maliciously
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 habitation and office; but the Judges intimated that
 a reasonable use of either would not be actionable. In
Walter v. Selfe (b), *Knight Bruce* V. C. was put in
 the position of judge and jury, and he found that the
 burning of bricks was a nuisance to the plaintiff's house,
 which was the same proposition as in *Jones v. Powell*.
 In *Rich v. Basterfield* (c), *Tindal* C. J. is reported to
 have said, "No man may use his right so as to damage
 another; though, on the other hand, everyone has a
 right reasonably to use his property, even if he should
 thereby annoy his neighbour." [*Erle* C. J. That I
 think is correct language; but the case was tried before
 me. *Wilde* B. In that dictum the term "annoy" is
 used in contradistinction to "damage."] In the report
 of the case in Banc, 4 C. B. 783, the trial is stated to
 have been before *Erle* J.; and according to that report
 (p. 787), the learned Judge left it to the jury to say,
 "whether or not the defendant had exercised his rights
 in a reasonable manner, with reference to the property
 in question." [*Erle* C. J. The nuisance in that case
 was, the making the tops of the chimney of a shop level
 with the first floor windows of the plaintiff's dwelling
 house.] In *Bliss v. Hall* (d), *Vaughan* J. said: "An
 offensive trade may be a nuisance or not according to
 the place in which it is carried on." To constitute a
 nuisance, the thing done must be injurious to health or

(a) *Hutt.* 135, 136; *S. C. Palm.* 536.

(b) 4 *De G. & Sm.* 315.

(c) 2 C. & K. 257, 258; *S. C. in banc*, 4 C. B. 783.

(d) 5 *Scott*, 500, 506; *S. C. 4 Bing. N. C.* 183.

comfort and be without excuse, that is, not in the reasonable use of a man's property. It is no answer to an action that the plaintiff has come to the nuisance; therefore, if this action is maintainable, a landowner may have erected and used a brick kiln on his land for many years, and yet a person who subsequently buys an adjoining piece of land and builds a dwelling house upon it may require the brick kiln to be discontinued.

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Mellish replied.

Cur. adv. vult.

WILLIAMS J. delivered the judgment of ERLE C. J., KEATING J., WILDE B. and himself.

On the argument of this case, there was some contest as to what the true question was which the Court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was, whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance.

It is not, perhaps, material which of these contentions is correct. For the Lord Chief Justice, at the trial, directed the jury, on the authority of *Hole v. Barlow* (a), to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burnt was a proper and convenient spot, and the

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burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brickkilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation.

It was therefore treated as a doctrine of law that, if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is, in truth, no such doctrine, there was a misdirection:— it is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, though it would admit all the allegations in the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts which, taken together with those stated in the declaration, shew that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to be, whether the case of *Hole v. Barlow* (a) was well decided. And we are of opinion that it was not.

That decision was plainly founded on a passage in *Comyns' Digest, Action upon the case for a Nuisance* (C), which is in the following words:—"So an action does not lie for a reasonable use of my right, though it be to

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the annoyance of another ; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." It may be observed that, in the language of this dictum (for which no authority is cited by *Comyns*), there is a want of precision, especially in the words "reasonable" and "convenient," which render its meaning by no means clear. And it may be doubted whether the Court, in *Hole v. Barlow* (a), did not misunderstand it. What is a "convenient place"? Does this expression mean, as the Court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade, or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by Mr. *W. H. Willes*, in his valuable edition of *Gale on Easements*, p. 410, note, that this latter sense of the word "convenient" is the one adopted by *Hide C. J.* in *Jones v. Powell* (b), where he says, "A tan house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another : in like manner of a glass house ; and they ought to be erected in places convenient for them." In the original *Norman-French* it is "Un tan house est necessary, car touts wear shoes ; et un-core ceo poit estre pull down, &c., si est erect al nusance d'auter : et issint de glass house ; Et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to public nuisances. Thus it is said in *Hawkins P.C.*, book 1, c. 75 (2 *Hawk. P. C.*, by *Leach*, p. 146, s. 10), "It seems to be agreed, that a brew house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neigh-

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bourhood, may be indicted as a common nuisance." It should seem, therefore, that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, *i. e.*, a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, *i. e.*, a place where it greatly incommodes an individual.

If this be the true construction of the expression "convenient" in the passage from *Comyns' Digest*, the doctrine contained in it amounts to no more than what has long been settled law, *viz.*, that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer and the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house.

In *Hole v. Barlow* (a), however, the Court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbour. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow* (a), and moreover the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of *Walter v. Selfe* (b). And the introduction of such a doctrine into

(a) 4 C. B. N. S. 334.

(b) 4 De Gex & Sm. 315, affirmed on appeal, see *Id.* 326.

our law would we think lead to great inconvenience and hardship, because, as was forcibly urged by Mr. *Mellish* in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbour's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the Judge to the jury in *Hole v. Barlow (a)*, which was upheld by the Court of Common Pleas was simply that the verdict ought to be for the defendant if the place where the bricks were burnt was a convenient and proper place for the purpose. But in the present case, the Lord Chief Justice's direction to the jury pointed at a further condition, viz., if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in *Hole v. Barlow (a)*, if accompanied with this addition, is maintainable.

If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly

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be asked whether the causing of the nuisance was a reasonable use of the land.

If such a question is proper for their consideration in an action such as the present, for a nuisance by immitting corrupted air into the plaintiff's house, we can see no reason why a similar question should not be submitted to the jury in actions for other violations of the ordinary rights of property; *e. g.* the transmission by a neighbour of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury, in such an action, ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, *e. g.* where a right has been gained to the lateral passage of light and air, no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet, on principle, it is difficult to see why such a question should not be left to the jury if *Hole v. Barlow* (a) was well decided.

We, are, however, of opinion that the decision in that case was wrong, and, consequently, that the direction of the Lord Chief Justice, which was founded on it, was erroneous, that the verdict for the defendant ought to be set aside, and a verdict entered for the plaintiff.

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POLLOCK C. B. The question in this case is, whether the direction of the Lord Chief Justice, professing to be founded on the decision of the Court of Common Pleas in *Hole v. Barlow*(a), was right, and in my judgment substantially it was right, viz., taking it to have been as stated in the case, viz., “that if the jury thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict.” I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances,—the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual,—as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion:—it must at all times be a question of fact with reference to all the circumstances of the case.

Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in *Grosvenor Square* which would be none in *Smithfield Market*, that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only. A

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1862. clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, from some whim or caprice, made the clock strike the hour every ten minutes, or the bell ring continually, I think a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance, but if built in an inconvenient place or manner, on purpose to annoy the neighbours, it might, I think, very properly be treated as one. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined the more clearly it will appear that all that the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them.

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I am of opinion that the passage in *Comyns' Digest, Action upon the Case for a Nuisance* (C.), is good law. I think the word "reasonable" cannot be an improper word, and too vague to be used on this occasion, seeing that the question whether a contract has been reasonably performed with reference to time, place and subject matter, is one that is put to a jury almost as often as a jury is assembled. If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some ap-

parent right, or a reasonable use of the land, house or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable,—as the jury must be taken to have found that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done. And this gets rid of the difficulty suggested in the judgment just read by my brother *Williams*; because it cannot be supposed that a jury would find that to be a reasonable act by a person which produces any ruinous effect upon his neighbours.

With respect to the proposed judgment of the Court, as the case does not state that leave was given by the consent of the defendant's counsel, or indeed at all, to enter a verdict for the plaintiff for 40*s.* damages, it appears to me that all that this Court of error can do, if it disapproves of the direction of the Lord Chief Justice, is to award a venire de novo, that the jury may find a verdict under a proper direction; for there is strong ground for contending that the entire plot of ground, of which the plaintiff's and the defendant's land formed a part, was sold in various lots, on the understanding that the brick earth should be made into bricks and burnt, in order to erect houses on the defendant's lots, and it would seem not perfectly just that the purchaser of one of the lots should actually turn his brick earth into bricks, and build a house, and then deny the same advantage to his neighbours. I think therefore that, if my learned

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1862. brothers are right in denying to the jury the power of
finding that any act was an act reasonable to be done,
still, on the statement of the present case, the Court
has not power to enter a verdict for the plaintiff for 40s.
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But in my opinion the judgment of the Court below
ought to be affirmed.

MARTIN B. read the judgment of

BRAMWELL B. I am of opinion that this judgment
should be reversed. The defendant has done that which,
if done wantonly or maliciously, would be actionable as
being a nuisance to the plaintiff's habitation by causing
a sensible diminution of the comfortable enjoyment of
it. This, therefore, calls on the defendant to justify or
excuse what he has done. And his justification is this:
He says that the nuisance is not to the health of the
inhabitants of the plaintiff's house, that it is of a tem-
porary character, and is necessary for the beneficial use
of his, the defendant's, land, and that the public good
requires he should be entitled to do what he claims
to do.

The question seems to me to be, Is this a justification
in law,—and, in order not to make a verbal mistake, I
will say, —a justification for what is done, or a matter
which makes what is done no nuisance? It is to be
borne in mind, however, that, in *fact*, the act of the
defendant is a nuisance such that it would be actionable
if done wantonly or maliciously. The plaintiff, then,
has a *prima facie* case. The defendant has infringed
the maxim *Sic utere tuo ut alienum non lædas*. Then,
what principle or rule of law can he rely on to defend

himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cess-pools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much

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for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

Then can this principle be extended to, or is there any other principle which will comprehend, the present case? I know of none: it is for the defendant to shew it. None of the above reasoning is applicable to such a cause of nuisance as the present. It had occurred to me, that any not unnatural use of the land, if of a temporary character, might be justified; but I cannot see why its being of a temporary nature should warrant it. What is temporary,—one, five, or twenty years? If twenty, it would be difficult to say that a brick kiln in the direction of the prevalent wind for twenty years would not be as objectionable as a permanent one in the opposite direction. If temporary in order to build a house on the land, why not temporary in order to exhaust the brick earth? I cannot think then that the nuisance being temporary makes a difference.

But it is said that, temporary or permanent, it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of

loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expences. If one of those expences is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it *compensated them* to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, 10*l.*, 50*l.* or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit he should do what he has done; if they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or by abatement of the nuisance a man who would not accept a pecuniary compensation might put

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a stop to works of great value, and much more than enough to compensate him. This objection, however, is comparatively of small practical importance; it may be that the law ought to be amended, and some means be provided to legalise such cases, as I believe is the case in some foreign countries on giving compensation; but I am clearly of opinion that, though the present law may be defective, it would be much worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage to individuals, without compensation, as is claimed by the argument for the defendant.

Since the decision of *Hole v. Barlow* (a), claims have been made to poison and foul rivers, and to burn up and devastate land, on the ground of public benefit. I am aware that case did not decide so much, but I have a difficulty, for the reasons I have mentioned, in saying that what has been so contended for does not follow from the principles enunciated in that case.

If we look to analogous cases I find nothing to countenance the defendant's contention. A riparian owner cannot take water for the public benefit; he cannot foul it for the public benefit, if to the prejudice of another owner. A common cannot be enclosed on such principle. A window, the fee simple of which is 5s., cannot be stopped up by a building worth 1,000,000l., of the greatest public benefit, nor a way. The windows of such a house might be blocked from light and air, however contrary that might be to the public benefit.

It is true that a man's character may be unjustly attacked in some cases without remedy. But we ought to follow the rule, not the exception; and that that is

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an exception and anomalous cannot be doubted. It is shewn by such instances as I have put, and by this :— if a man sees another apparently committing a felony, he is bound by law to prevent it if the man is really committing it ; but if it turns out that no felony is being committed, the arrest of such a man would be an assault and false imprisonment.

As to the somewhat remote illustration of taking a man's land in case of foreign invasion, it is said that is a case of " necessity ;" but it can hardly be a " necessity" to burn bricks on the defendant's land, to the nuisance of the plaintiff, without compensation.

I confess then I can see no reason or principle in the defendant's contention.

With the greatest respect for those who decided *Hole v. Barlow* (a), I cannot, for the reasons I have given, agree with it. That case reminds me strongly of what the late Lord *Denman* said, that he suspected a case very much when he found it continually quoted immediately after its decision ; and certainly *Hole v. Barlow* has been so quoted, and defences made on its authority which never would have been thought of before it appeared. It stands alone. It is practically opposed to cases of daily occurrence, where such a point might have been made and was not. I have a difficulty in putting a meaning on the words " convenient, reasonable and proper," as there used. " Convenient, reasonable and proper" as regards the sufferer ? No. " Convenient, reasonable and proper" as regards the defendant ? That cannot be, as that might place the nuisance close to the plaintiff, to the entire loss of the power of dwelling in

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1862. his house. "Convenient, reasonable and proper" as
BAMFORD between the two? Then the nuisance may lawfully be
v. greater, as the defendant's premises are smaller and so
TURNLEY. his kiln *must* be nearer. "Convenient, reasonable and
proper" as regards the public good? That I have already
dealt with. These words are perfectly intelligible when
applied to such nuisances as would form the common
and ordinary use of land, &c. See the comments on
the case by Mr. *W. H. Willes* in his edition of *Gale on
Easements*, p. 409, note. It is countenanced by the pas-
sage from *Comyns' Digest*, tit. *Action upon the Case for
a Nuisance* (C.) alone, which is contradicted in the same
book, and is sufficiently dealt with by the judgment of
my brother *Williams*.

In the result, then, I think it should be overruled,—
which practically is the question here; and that our
judgment should be for the plaintiff.

Judgment reversed, and entered for
the plaintiff for 40s. (a).

(a) The parties afterwards agreed to enter a *stet processus*.

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IN THE EXCHEQUER CHAMBER.

*Thursday,
June 19th.*TAMVACO and others *against* LUCAS and others.*Vendor and
vendee.
Construction
of contract.
"Payment in
exchange for
shipping
documents."*

The defendants had become responsible, as *del credere* agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50s. per quarter free on board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50s. per quarter, 4626*l.*, less freight, at 10s. 9*d.* per quarter, 1001*l.* 10s.; and a policy of insurance effected on the cargo valued at 3600*l.* On behalf of the plaintiffs evidence was given, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not paying or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender, nor did they tender, "the usual shipping documents" according to the contract: Held, that whether the plaintiffs had so tendered was a question for the jury.

THE defendants having appealed against the decision of the Court in this case, reported vol. 1, p. 185, the appeal was now heard before ERLE C. J., POLLOCK C. B., WILLIAMS, WILLES and BYLES JJ., and MARTIN and CHANNELL BB.

The Court, at the outset, remarked that new facts, which were not brought to the notice of the Court below, had been introduced into the case, and declared their intention to disregard them.

Honyman (*Mathew* with him), for the defendants, argued that the policy of insurance in this case, being a written document, the construction of it was for the Court; and that the term insurance meant indemnity against loss, for which purpose the policy tendered was not sufficient.

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Watkin Williams (*Montague Smith* with him), for the plaintiffs, were not called on.

The COURT said the judgment must be affirmed. Whether the delivery of such documents as were here delivered was a compliance with the contract to deliver the shipping documents was not a question of law, but of fact, which had been determined by the jury against the defendants.

Judgment affirmed.

Thursday,
June 19th.

GORTON *against* GREGORY, executor of HALL.

*Covenant
running with
the reversion.
Executor.
Entry of
judgment.*

A., by indenture, demised to *B.* for a term of years "certain print and bleach works and other premises, with certain articles, matters and things specified in a schedule thereunder written." and it was agreed that it should be lawful for *B.*, his executors, administrators and assigns, during the continuance of the term, to "renew, reinstate, replace and substitute by new or improved articles, matters and things, any of the articles, matters and things mentioned and specified in the schedule which might become worn out, damaged, destroyed, rendered useless or superseded by improved machinery, and for any of the purposes aforesaid to sell and dispose of such articles, matters and things as should so become worn out, damaged, destroyed, &c., and retain the money arising by any such sale or sales to and for his and their own use and benefit; and also to purchase any new or additional articles, matters and things which he or they might require to be used in his or their trade of a calico printer and bleacher, and also to make any improvements in and upon the works and premises; and at the end or other sooner determination of the term of ten years thereby granted thereof, the articles, matters and things mentioned and specified in the schedule, or such of them as should then remain and be in and upon the demised premises, and also all substituted or renewed articles and things, and also all improvements and additional articles and things which might have been purchased by *B.*, his executors, administrators or assigns, and used by him or them in or upon the demised premises in his or their trade or business of a calico printer and bleacher, or any other trade, should be valued and appraised." *A.* died during the term, having appointed &c. his executor, and devised to him the reversion in the premises, and the articles, matters and things expectant on the determination of the term at the time of his decease: Held, that this covenant did not run with the reversion, and therefore that *B.*, having, in an action against the executor of *A.*, recovered the amount of the appraisal and his costs, judgment *de bonis propriis* was erroneous, and that it ought to be entered "*de bonis testatoris, et si non de bonis propriis.*"

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THE declaration alleged that the plaintiff, *Thomas Gorton*, sued *John Hall* for that, by an indenture made the 8th *March*, 1851, between one *Richard Hall* of the one part, and the plaintiff of the other part, certain print and bleach works and other premises in the said indenture particularly mentioned and described, with certain articles, matters and things mentioned and specified in a schedule thereunder written, were demised by *Richard Hall* to the plaintiff for certain terms in the indenture in that behalf mentioned and now expired. And by the indenture it was provided and declared and agreed, by and between the said parties thereto, that it should be lawful for the plaintiff, his executors, administrators and assigns, and he and they were thereby authorized and empowered from time to time during the continuance of the terms to renew, reinstate, replace and substitute, by new or improved articles, matters and things, any of the articles, matters and things mentioned and specified in the schedule which might become worn out, damaged, destroyed, rendered useless or superseded by improved machinery, and for any of the purposes aforesaid to sell and dispose of such articles, matters and things as should so become worn out, damaged, destroyed, &c., and retain the money arising by any such sale or sales to and for his and their own use and benefit; and also to purchase any new or additional articles, matters and things which he or they might require to be used in his or their trade of a calico printer and bleacher, and also to make any improvements in and upon the works and premises not exceeding the value of 500*l.*; and all which renewed, &c. articles, matters and things,

1862. and also the said improvements, should be included
GORTON and taken into account in the valuation and appraise-
V. ment to be made as thereafter mentioned and pro-
GREGORY. vided for &c. ; and it was also provided &c., that at the
end or other sooner determination of the term of ten
years thereby granted thereof, the articles, matters
and things mentioned and specified in the schedule,
or such of them as should then remain and be in and
upon the demised premises, and also all substituted
or renewed articles and things, and also all improve-
ments not exceeding the value of 500*l.*, and additional
articles and things which might have been purchased
by the plaintiff, his executors, administrators or assigns,
and used by him or them in or upon the demised
premises &c. in his or their trade or business of a calico
printer and bleacher, or any other trade, should be
valued and appraised by two indifferent persons, one of
them to be nominated and appointed by and on behalf
of *Richard Hall*, his heirs, executors, administrators
or assigns, and the other to be nominated and ap-
proved by and on behalf of the plaintiff, his executors,
administrators or assigns ; and that in case such two
persons so to be nominated and appointed should not
agree in the estimate or value of the articles, matters
and things mentioned and specified in the schedule,
or such of them as should then remain and be in
and upon the demised premises &c., and of such sub-
stituted or renewed and additional articles and things
the same should be valued and appraised by such one
indifferent person as the first two nominees should
for that purpose appoint umpire in the premises :
and it was further declared and agreed, &c., that in
case the amount of such valuation and appraisement

should be under or less than the value at the date of the indenture of the articles, matters and things mentioned and specified in the schedule, to wit, the sum of 4588*l.*, after deducting from the last mentioned sum a fair and reasonable allowance upon the amount thereof for the depreciation of the articles, matters and things by ordinary wear and tear during the term of ten years, then and in such case the plaintiff, his executors, administrators or assigns, should and would within one calendar month next after the amount thereof should be so ascertained, pay unto *Richard Hall*, his heirs or assigns, such sum of money as should be so ascertained to be the difference between the amount of the value at the date of the indenture, after such deduction for wear and tear, and the amount of such valuation and appraisement; but in case the amount of such valuation and appraisement should exceed the sum of 4588*l.*, after making such deduction therefrom for wear and tear, then and in such case *Richard Hall*, his heirs, executors, administrators or assigns, should and would, within one calendar month next after the ascertainment thereof, pay unto the plaintiff, his executors, administrators or assigns, the amount of the excess beyond, or difference between, the value at the date of the indenture after such deduction for wear and tear, and the amount of such valuation and appraisement. The declaration then alleged that afterwards, and during the continuance of the terms, *Richard Hall* died, having, by his last will and testament appointed the defendant executor thereof, and having thereby devised and bequeathed the several reversions of and in the demised premises and articles, matters and things, expectant on the determi-

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1862. nation of the several terms of years at the time of
the death of *Richard Hall* to the defendant: and
that at the end of the term of ten years the plaintiff
nominated and appointed one *G. G.* on his behalf,
and the defendant nominated and appointed one *T. M. F.* on his behalf, as two indifferent persons to make
such valuation and appraisement as aforesaid of the arti-
cles, matters and things specified in the schedule, or such
of them as then remained and were in and upon the
demised premises, and also all substituted or renewed
articles and things, and also all improvements not ex-
ceeding the value of 500*l.*, and additional articles and
things which had been purchased by the plaintiff and
used by him in or upon the demised premises, &c., in
his trade or business. It then stated that *G. G.* and
T. M. F. entered upon such valuation and appraisement,
but did not agree in the estimate or value of the
articles, matters and things mentioned and specified
in the schedule, or such of them as then remained
and were in and upon the demised premises &c., and
of such substituted or renewed and additional articles
and things as aforesaid, and thereupon duly appointed
one *G. B.*, being an indifferent person, umpire in the
premises, according to the form and effect of the
indenture in that behalf; that *G. B.*, as such umpire,
did value and appraise the articles, matters and things
mentioned and specified in the schedule, or such of
them as at the end of the term of ten years remained
and were in and upon the demised premises, and
such substituted or renewed and additional articles
and things as aforesaid, and all other articles, matters
and things to be so valued and appraised, and did
value, estimate and appraise the same as follows, by

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and in a valuation or appraisement in writing (that is to say), such of the articles, matters and things specified in the schedule as at the end of the term of ten years remained and were in and upon the demised premises, and all substituted or renewed articles and things, at the sum of 3627*l.* 17*s.* 11*d.*: improvements at the sum of 167*l.* 10*s.*; and additional articles and things purchased by the plaintiff and used by him in or upon the demised premises, at the sum of 344*l.* 15*s.*; making in the whole the sum of 4190*l.* 2*s.* 11*d.*: that *G. B.* did thereby further certify that he considered the sum of 1538*l.* was a fair and reasonable allowance for depreciation of the articles, matters and things specified in the schedule by ordinary wear and tear during the term of ten years, to be deducted from the sum of 4588*l.*, the value at the date of the lease of such articles, matters and things. The declaration then averred that the sum of 1538*l.* was a fair and reasonable allowance upon the amount of 4588*l.* for the depreciation of the articles, matters and things specified in the schedule, by ordinary wear and tear during the term of ten years: together with the fulfilment of all conditions, &c., necessary to entitle him to be paid the sum of 1140*l.* 2*s.* 11*d.*, being the amount of the difference between the value at the date of the indenture of the articles, matters and things specified in the schedule, after making such deduction therefrom for wear and tear, and the amount of such valuation and appraisement: alleging as a breach the non-payment of that sum, &c.

The defendant pleaded:

1. That the deed in the declaration mentioned was not the deed of *Richard Hall*.
2. A traverse of the umpirage of *G. B.*

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3. That the excess beyond or difference between the value at the date of the indenture, after such deduction as in the declaration mentioned in that behalf, for wear and tear, and the amount of the value and appraisement in the declaration also mentioned, was not ascertained before the commencement of this suit.

4. That the sum of 1538*l.*, in the declaration mentioned, was not nor is a fair and reasonable allowance upon the amount of 6588*l.* for the depreciation of the articles, matters and things specified in the schedule by ordinary wear and tear during the term of ten years.

Issue on all the pleas.

The case was tried, and the jury having found for the plaintiff on all the issues, with 1140*l.* 2*s.* 11*d.* damages and 40*s.* costs, judgment was signed as follows:

“Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid, in form aforesaid, assessed, and also 180*l.* 8*s.* 1*d.* for his costs of suit by the Court here adjudged, of increase to the plaintiff, which said moneys and costs in the whole amount to 1322*l.* 11*s.*”

The now defendant, executor of the last will and testament of *John Hall*, deceased, alleged error in the above record and proceedings.

Joinder in error.

Mellish (*Spinks* Serjt. with him), for the defendant.—The entry of judgment *de bonis propriis* is erroneous, but may be amended. In *Spencer's Case* (a) the law is laid down thus: “If a man leases sheep or other stock of cattle, or any other personal goods for any time, and the

(a) 5 Co. 16, *Resol.* 3; 1 *Smith L. C.* 36.

lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors, or administrators, who represent him. The same law, if a man demises a house and land for years, with a stock or sum of money rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee: and it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted." Here was the demise of a manufactory with certain "articles, matters and things," and it is impossible to contend that those words do not include "goods and chattels." In 2 *Williams on Executors*, 1788, 5th ed., it is said, "Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such, (except a release to himself) the judgment against him must be, that the plaintiff do recover the debt and costs to be

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1862. levied out of the assets of the testator, if the defendant
GORTON have so much, but if not, then the costs out of the
v. defendant's own goods: otherwise, the judgment will be
GREGORY. erroneous."

No counsel appeared for the plaintiff.

ERLE J. This is an action of covenant against the executor of *Richard Hall*. *Richard Hall* was the landlord, and the plaintiff was tenant to him of certain print and bleach works and other premises, with certain articles, matters and things mentioned in a schedule to the indenture.

There was a covenant to "renew, reinstate, replace and substitute, by new or improved articles, matters and things, any of the articles, matters and things mentioned and specified in the schedule which might become worn out, damaged, destroyed, rendered useless or superseded by improved machinery, and for any of the purposes aforesaid to sell and dispose of such articles, matters and things as should so become worn out, damaged, destroyed, &c., and retain the money arising by any such sale or sales to and for his and their own use and benefit, and also to purchase any new or additional articles, matters and things which he or they might require to be used in his or their trade of a calico printer and bleacher, and also to make any improvements in and upon the works and premises." And then there was a covenant that "at the end or other sooner determination of the term of ten years thereby granted thereof, the articles, matters and things mentioned and specified in the schedule, or such of them as should then remain and be in and upon the demised pre-

1862. levied out of the assets of the testator, if the defendant
GORTON have so much, but if not, then the costs out of the
v. defendant's own goods: otherwise, the judgment will be
GREGORY. erroneous."

No counsel appeared for the plaintiff.

ERLE J. This is an action of covenant against the executor of *Richard Hall*. *Richard Hall* was the landlord, and the plaintiff was tenant to him of certain print and bleach works and other premises, with certain articles, matters and things mentioned in a schedule to the indenture.

There was a covenant to "renew, reinstate, replace and substitute, by new or improved articles, matters and things, any of the articles, matters and things mentioned and specified in the schedule which might become worn out, damaged, destroyed, rendered useless or superseded by improved machinery, and for any of the purposes aforesaid to sell and dispose of such articles, matters and things as should so become worn out, damaged, destroyed; &c., and retain the money arising by any such sale or sales to and for his and their own use and benefit, and also to purchase any new or additional articles, matters and things which he or they might require to be used in his or their trade of a calico printer and bleacher, and also to make any improvements in and upon the works and premises." And then there was a covenant that "at the end or other sooner determination of the term of ten years thereby granted thereof, the articles, matters and things mentioned and specified in the schedule, or such of them as should then remain and be in and upon the demised pre-

mises, and also all substituted or renewed articles and things, and also all improvements and additional articles and things which might have been purchased by the plaintiff, his executors, administrators or assigns, and used by him or them in or upon the demised premises &c., in his or their trade or business of a calico printer and bleacher, or any other trade, should be valued and appraised;" and if the amount of the valuation should be less than the value of the goods on the premises at the date of the indenture, the landlord was to pay the excess, but if less than that amount, then the tenant was to pay the landlord.

The term has come to an end. The landlord is dead, and the plaintiff has recovered judgment and execution against the defendant, who is his executor, on the ground that the things brought on the premises by the plaintiff exceeded the value of the articles which were upon the premises at the time when he took them.

I am clearly of opinion that this covenant does not run with the reversion, but that the defendant is liable as executor, seeing that the covenant relates principally to chattels on the premises; and the words "articles, matters and things" indicate moveable chattels, which might be replaced. The judgment therefore should be entered against the defendant, as executor. But the judgment before us makes him liable *de bonis propriis*, and should be amended in the manner pointed out by my brother *Williams* in the passage which has been cited.

WILLES J. It is impossible to say that the chattels here spoken of are confined to fixtures. If they had been, the covenant would have run with the land, for the lease provides that the tenant is to make improve-

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GORTON
v.
GREGORY.

1862. ments to an amount not exceeding 500*l.*, a covenant
GORTON which would clearly relate to the land itself. But the
v. covenant is also to purchase any new articles, matters,
GREGORY. and things, in substitution of those mentioned in the
 schedule which might be worn out, so that the covenant
 relates not only to improvements in the land, but to
 new articles introduced for the purpose of the trade of
 the person to whom the land is let.

BYLES J. and CHANNELL B. concurred.

Judgment amended accordingly.

Thursday,
June 19th.

NICHOLL and others *against* ALLEN.

For the report of this case see vol. 1, p. 934.

MEMORANDUM.

In the case of *Edwin John James, Esq.*, Q. C., who was disbarred by the Benchers of the Honourable Society of the Inner Temple in *Trinity* Vacation, 1861, (see vol. 1, p. 640,) the Queen, by letters patent under the Great Seal of the United Kingdom, determined the letters patent whereby he was appointed one of Her Majesty's counsel learned in the law, and removed and discharged him from that office.

END OF TRINITY VACATION.

CASES

1862.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XXVI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.	BLACKBURN J.
WIGHTMAN J.	MELLOR J.

WOODS and Others *against* DEAN.

*Wednesday,
November 6th.*

In an action by indorsee against indorser, it appeared that the defendant, upon being told that the holders of the bill were about to take proceedings against him on it, said that he would pay the bill if time to pay it were given him: Held evidence from which the jury might infer that he had waived the right to notice of dishonour.

*Bill of exchange.
Notice of dishonour.
Waiver.*

THIS was an action brought by the plaintiffs as indorsees and holders of a bill of exchange, drawn by *John Young & Co.*, on the 6th *March*, 1861, upon Messrs. *L. & M. Cooke*, for 108*l.* 17*s.* 6*d.*, payable four months after date, against the defendant as indorser. The first count alleged that the defendant had due notice

1862. of dishonour. The second count alleged "that the defendant waived his right to and exonerated and discharged the indorsee and holder of the said bill when it became due, and the plaintiffs, from giving to the defendant due notice of the said dishonour."

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Second plea to the first count traversed due notice of dishonour. Ninth plea to the second count traversed the waiver of dishonour.

Issues thereon.

On the trial, before *Mellor J.*, at the last Summer Assizes at *Durham*, it appeared that, after previous indorsements, the bill was indorsed by the defendant to *John Young & Co.*, and by them to the plaintiffs, who were bankers at *Sunderland*. On the 16th *April*, 1861, Messrs. *Cooke*, the acceptors, executed an assignment for the benefit of their creditors, and on the 8th *May*, 1861, were adjudicated bankrupts upon the petition of the defendant. Messrs. *Young* were aware of this fact, and that the bill given by Messrs. *Cooke* would not be met. A few days before the bill became due, they wrote to the defendant as follows :

" 130, *High Street*,
" *West Sunderland*,
" *July 3d*, 1861.

" Mr. *W. H. Dean*,
" *Durham*,

" Dear Sir,—We beg to remind you that the draft of Messrs. *L. & M. Cooke*, value 108*l.* 17*s.* 6*d.*, is due on the 9th inst. at Messrs. *Barclay & Co.*, *London*. As this draft was guaranteed and indorsed by you in our favour for Messrs. *L. & M. Cooke*, you may think it desirable to protect it from being returned.

" Yours respectfully,
" per proc. *John Young & Co.*
" *A. W. Phillips.*"

The bill became due on the 9th *July*, and was dishonoured. On the 15th *July* Messrs. *Young* wrote a letter to Messrs. *Cooke*, stating that their acceptance guaranteed by the defendant's indorsement was returned dishonoured, and was then in the hand of the plaintiffs, and inquiring whether the defendant intended to pay them. On the 20th *July* a letter was written to the defendant by Messrs. *Wright*, attorneys, applying for payment of the amount of the bill which had been dishonoured, and stating that if the amount, with expenses, was not paid on or before the 23d inst. they were instructed to take proceedings for the recovery thereof. *John Young* was called, and stated that on the 23d *July* he had an interview with the defendant in reference to the bill, in which he told the defendant that the plaintiffs were about to take proceedings against him for the recovery of the bill, and asking him what he was going to do about it. The defendant said that he would pay the bill if time were given him to pay it. *Young* said he thought the plaintiffs would give him time. The defendant said it would be a convenience to him to have time, and that he would write in two or three days, and say what time would suit him. The defendant, who was called, stated that he did not receive any notice of dishonour; and his evidence, as to what occurred at the interview on the 23d *July*, conflicted with that given by *Young*. On the 24th the defendant consulted his attorney, who wrote to Messrs. *Wright*, stating that the defendant had handed to them their letter of the 20th, and inquiring on whose behalf they were acting, and stating that the defendant in his interview with *Young* had declined to make any arrangements until he had seen them. It

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was objected for the defendant that there was no evidence of notice of dishonour. The learned Judge left to the jury to say whether the defendant had agreed to waive the right to notice of dishonour by promising to pay. The jury found that there had been no notice of dishonour, but that the defendant had waived notice; and a verdict was thereupon entered for the plaintiff.

Edward James moved for a rule nisi for a new trial on the ground of misdirection.—There was no evidence of any waiver by the defendant of his right to notice, at any rate none before the bill was dishonoured. [*Blackburn J.* In *Byles on Bills*, p. 279, 8th ed., which is high authority, it is stated that, “The consequence of neglect of notice will be waived, by a subsequent promise to pay.”] *Rabey v. Gilbert (a)* is an authority for that position, but there the admission was by suffering judgment by default in an action brought by a subsequent indorsee. [*Wightman J.* That circumstance makes no difference in the effect of the admission. It is an established doctrine, that knowledge that the bill when presented will not be paid dispenses with necessity of notice; *Cory v. Scott (b)*. Is not the defendant’s promise to pay the bill conclusive as against him that he had notice of dishonour?] The jury have negatived the fact of notice. In *Byles on Bills*, 8th ed., note (f), it is said, “Many of the cases cited below fail in drawing the distinction between the effect of a promise as a *waiver* of notice, and its effect as *evidence* of notice.” [*Blackburn J.* referred to *Story on Bills*, s. 320.] There it is said, “In general, it may be

(a) 6 H. & N. 536.

(b) 3 B. & A. 619.

stated, that a party, who is once discharged, by want of notice, or other laches, on the part of the holder, is always discharged, and he cannot be made again liable, unless by his own voluntary act. But . . . he may waive his right to take the exception, and confirm his original obligation. If he makes such a waiver, in ignorance of the facts, he will not be bound thereby. But, if he makes it with a full knowledge of all the facts, but under a mistake of the law, he will be bound thereby. And, under such circumstances, it will make no difference, whether the party has paid the bill under a mistake of law, or has only promised to pay the bill. Indeed, a promise, by the party entitled to notice, to pay the bill, is deemed a full and complete waiver of the want of due notice; and payment of a part of the money due on the bill will have the same effect. But, then, in all cases of this sort, the promise must be unequivocal, and amount to an admission of the right of the holder; or the act done must be of a nature clearly importing a like admission of his right. If it be defective in either respect, or if it be a conditional offer of payment, not accepted, then, and in such a case, the holder has no right to insist upon it as a waiver. So, if the promise be qualified, it must be received with its qualifications, and cannot be insisted upon as an absolute waiver." *Chitty and Hulme on Bills*, 9th ed., p. 505-6, is to the same effect. In the present case the promise of the defendant was conditional only. [*Cockburn C. J.* An admission of liability is evidence of a waiver of the right to notice; and a waiver may be either before or after the time when notice ought to be given.] The allegation in the second count of the declaration is, that

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the defendant waived his right to notice *when the bill became due*. [Mellor J. If that objection had been taken at the trial I should have amended the declaration.]

COCKBURN C. J. I think that there was strong evidence that the defendant had waived his right to have notice of dishonour; and it may be presumed that he waived his right prior to the time when notice ought to have been given.

WIGHTMAN J. I am unwilling, by granting a rule, to throw any doubt on this point. There was evidence that notice of dishonour had been dispensed with. An admission of liability admits that everything has been done which entitles the plaintiff to sue, and therefore admits that notice of dishonour had been waived.

BLACKBURN J. I am of the same opinion. I think that, after the authorities of the text books, *Story on Bills*, s. 320, and *Byles on Bills*, 8th ed., pp. 279, 281, no authority being cited to the contrary, we ought not to grant a rule. Where a promise to pay is made by an indorser of a bill with full knowledge of the facts, and he is aware that he has had no notice of dishonour, that is equivalent to agreeing that he will not take advantage of the want of notice; in other words, is a waiver of the right to notice. I take this to be established law, subject to the qualification in the text books, viz. that a promise to pay after the bill has been dishonoured is not conclusive evidence of waiver. The objection raised on the form of the pleadings would have been cured by an amendment.

MELLOR J. At the trial I wished to reserve the point, being in some doubt upon it; but Mr. *Manisty*, for the plaintiffs, supposing that he could strengthen their case in the event of a new trial, refused to consent. I am now satisfied that I was right in acting on the law laid down in *Byles on Bills*, 8th ed., p. 279, and I am confirmed in that view by the discussion which has taken place.

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Rule refused.

The QUEEN *against* The Inhabitants of NEW-
 CHURCH.

 Friday,
 November 8th.

A lunatic pauper born in *England*, whose father, an *Irish* man, had not gained a settlement in *England*, and whose mother was not known to have ever gained a settlement, being above the age of sixteen, but living with his parents, and unemancipated, was removed to a lunatic asylum under stat. 16 & 17 *Vict.* c. 97.: Held, that an order for his maintenance upon the parish of his birth was rightly made under sect. 97.

*Pauper
 lunatic.
 Irish parent.
 Birth settle-
 ment.
 16 & 17 Vict.
 c. 97. s. 97.*

UPON appeal against an order of two justices for the county of *Lancaster*, adjudging that the last legal settlement of *Luke Finley*, a pauper lunatic, confined in the county lunatic asylum at *Prestwich*, in the county of *Lancaster*, was in the township of *Newchurch*, in the *Haslingdon* Union, in that county; and ordering the guardians of the Union to pay to the overseers of the poor of the township of *Tottington Lower End*, in the *Bury* Union, in the same county, and to the treasurer of the asylum, certain sums of money in respect of the past and future maintenance of the pauper lunatic; the

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Quarter Sessions confirmed the order, subject to the opinion of this Court, on a case which, after setting out the order, proceeded as follows:—

Luke Finley, mentioned in the order, is the legitimate son of *Bernard Finley* and *Alice* his wife. He was born in the appellant township in 1838. His father, *Bernard Finley*, was born in the province of *Leinster*, in *King's County*, in *Ireland*, and is an *Irish* man, never having had any settlement in *England* or *Wales*. *Alice Finley* is an *English* woman, but is not known to have ever gained a settlement. From *July*, 1855, to the present time, *Bernard* and *Alice Finley* have resided together continuously in the respondent township of *Tottington Lower End*. From *July*, 1855, to the 29th *July*, 1859, *Luke Finley* resided with his parents in that township. On the 29th *July*, 1859, *Luke Finley* being then a pauper lunatic chargeable to the township of *Tottington Lower End*, was, under an order of a justice of the peace for the county of *Lancaster*, made in pursuance of The Lunatic Asylums Act, 1853, removed to the lunatic asylum at *Prestwich*, the same being one of the lunatic asylums for the county of *Lancaster*.

From the 29th *July*, 1859 to the present time, *Luke Finley* has been confined in the asylum at *Prestwich*, and during the whole of that period the cost of his maintenance in the asylum has been charged to and defrayed by the township of *Tottington Lower End*. Unless the removal of *Luke Finley* under the circumstances hereinbefore described constituted an emancipation, he never was emancipated.

It was contended, on the part of the appellants, that under the circumstances herein stated the order ought

not to have been made, inasmuch as the place of birth of *Luke Finley* could not be held to be his last legal settlement, within the meaning of The Lunatic Asylums Act, 1853, 16 & 17 *Vict. c. 97*.

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It was contended on the part of the respondents that the order was rightly made.

The question for the opinion of the Court is, Whether the order was under the circumstances rightly made.

If this question is answered in the negative, the order is to be quashed; if in the affirmative, the order is to be confirmed.

Mellish and *Hopwood*, for the respondents.—The order in question was rightly made, under stat. 16 & 17 *Vict. c. 97. s. 97.*, upon the appellant parish, as the last legal settlement of the pauper lunatic. Such an order is to be made, under sect. 98, upon the county, if the pauper lunatic is not settled in the parish by which or at the instance of which he is sent to the lunatic asylum, and it cannot be ascertained in what parish he is settled. The present case is not affected by stat. 8 & 9 *Vict. c. 117*, for the removal of poor persons born in *Ireland*, &c., because, the pauper lunatic being above the age of sixteen years, his maintenance in the asylum did not make his father chargeable, *Reg. v. St. Mary, Islington* (a); and therefore his father could not be removed to *Ireland* under sect. 2 of that statute. [*Blackburn J.* In that case, the mother, with whom the pauper lunatic resided when he was not in the asylum, was irremovable by stat. 9 & 10 *Vict. c. 66. s. 1.*]

The settlement of the pauper lunatic is in the appellant parish, as the place of his birth; *Reg. v. The*

(a) *Ante*, p. 46.

1862. *Inhabitants of All Saints, Derby* (a), per Coleridge J., where it was held that the children of *Irish* parents who became chargeable while under the age of sixteen years, after their father had deserted them and their mother had died, were removable to the parish of their birth. And the pauper lunatic, though residing with his father and unemancipated, unless removable together with his father to *Ireland*, is chargeable to the parish of his birth; *Reg. v. The Inhabitants of St. Giles without Cripplegate* (b). [Wightman J. Every child has a birth settlement unless it is displaced. Cockburn C. J. Has the pauper lunatic a birth settlement while he is an unemancipated member of his father's family? Blackburn J. In one sense he has, because that will be his settlement after he is emancipated. Cockburn C. J. Suppose an *Irish* man, not settled in *England*, with a family, one of whom, under the age of sixteen, falls ill, and he becomes chargeable, would an order removing him with his family to *Ireland* be bad?] No; because a child under that age, though it has a birth settlement, is irremovable from its father. [Blackburn J. Perhaps the child might be relieved as casual poor.] In *Burn's Justice*, by Bere and Chitty, vol. 4, p. 409, it is said: "Until the settlement of the father or of the mother has been ascertained, the settlement of a legitimate child, like that of a bastard, is *primâ facie* in the parish where the birth took place; and, if that cannot be ascertained, then the child is not removable from the place where it was found, and must be relieved there as casual poor." [Wightman J. In *Reg. v. The Inhabitants of Preston* (c), where *Rex v. The Inhabitants of Great*

(a) 14 Q. B. 207. 216-7.

(b) 17 Q. B. 636.

(c) 12 A. & E. 822.

Clacton (a) and *Rex v. The Inhabitants of Mile End Old Town* (b) were referred to, a pauper, born in *England* of Irish parents, which parents had no settlement in *England*, was held to be removable, after his emancipation, to the place of his birth.] [They also cited *Rex v. The Inhabitants of Whitehaven* (c) and *Reg. v. The Inhabitants of St. Marylebone* (d).]

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J. Kay, for the appellants.—At the time when the order was made, the pauper lunatic being unemancipated and part of his father's family, had no legal settlement, and therefore the order should have made him chargeable to the county, under stat. 16 & 17 *Vict. c. 97. s. 98.* The case finds that, unless removal to the asylum constitutes emancipation, the pauper lunatic was unemancipated; and *Rex v. The Inhabitants of Much Cowarne* (e) shews that an idiot, though separated from his parents after twenty-one years of age, is not emancipated. *Parke J.* said, p. 865: "He must be considered as in the same situation as if he had remained a minor." [*Wightman J.* It is not to be presumed that the pauper lunatic will always remain a lunatic. *Blackburn J.* It is sufficient for the purpose of the respondents that it is found that, before the time of making the order and since, the pauper has been a lunatic.] Even if a lunatic could be emancipated, the sending him to a lunatic asylum does not constitute an emancipation. An unemancipated child has no settlement but that of his parents. In *Rex v. The Inhabitants of Witton cum Twambrookes* (f) it was held that a child

(a) 3 B. & A. 410.

(c) 5 B. & A. 720.

(e) 2 B. & Ad. 861.

(b) 4 A. & E. 196.

(d) 16 Q. B. 352.

(f) 3 T. R. 355.

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was not emancipated so as to lose the benefit of any settlement which his father might gain until the age of twenty-one, or marriage, or until he had gained a settlement in his own right, or contracted some relation inconsistent with the idea of his being in a subordinate situation in his father's family. [*Blackburn J. Lord Kenyon* was there speaking of a child *acquiring* an independent settlement.] In such a case as the present, birth does not confer a settlement, owing to stat. 8 & 9 *Vict. c. 117.*; and an unemancipated child, of parents who have no settlement, cannot have a settlement. [*Cockburn C. J. Stat. 8 & 9 Vict. c. 117.* does not apply, because the father is not chargeable.] *Rex v. The Inhabitants of Whitehaven* (a) is overruled by *Rex v. The Inhabitants of Mile End Old Town* (b), where *Patteson J.*, referring to that case, p. 203-4, said that it was to be observed "that the question, how far the woman, circumstanced as she was, could gain a settlement by birth, was not noticed at all; whereas in the case of *Rex v. Leeds* (c) that question was considered, and it was held that birth, in such case, gave no settlement." [*Cockburn C. J.* The judgment in *Rex v. The Inhabitants of Whitehaven* does not warrant the marginal note in saying "that the daughter might be removed by an order to the place of her birth settlement."] In *Rex v. The Inhabitants of Leeds* (c) *Holroyd J.* said, p. 502: "By the Act, if the husband becomes chargeable by himself, or his family, he may be removed; and, it seems to me, that it is altogether immaterial, provided the head of the family be born in *Scotland*, whether the children be born in *Eng-*

(a) 5 B. & A. 720.

(b) 4 A. & E. 196.

(c) 4 B. & A. 498.

land or not ;" that is, that birth in such a case confers no settlement. [*Wightman J.* Suppose the pauper lunatic was emancipated.] There is authority that he would have a birth settlement. [*Cockburn C. J.* Suppose a case before the passing of any statute enabling the removal of *Irish* parents to *Ireland*, could the child be separated from the father's family?] No: the parent and child would be relieved as casual poor. [*Mellor J.* In *Rex v. The Inhabitants of Mile End Old Town* (a) the child remained part of the father's family, and rendered him removable to *Ireland*: here the relief to the pauper lunatic is not relief given to the father constructively. In *Rex v. The Inhabitants of Preston* (b) the pauper was emancipated; but the only difference which that makes is that an unemancipated child cannot be removed.] If it is held that, where the settlement of the parents is not known, the child has a birth settlement, it will lead to the separation of the members of families. A child born in *Northumberland*, and residing unemancipated with its parents in *Cornwall*, and becoming lunatic, might then be sent to an asylum in *Northumberland*. [*Blackburn J.* The separation in that case would result from sending the child to the asylum.] [*Mellish.* Sect. 3 of stat. 9 & 10 *Vict. c. 66.* forbids the removal of children under the age of sixteen years residing with their parents.] As to children above that age, the inconvenience will still exist.

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COCKBURN C. J. The case of *Reg. v. The Inhabitants of St. Giles without Cripplegate* (c) is directly in point, and the argument of Mr. *Kay* has not distinguished this

(a) 4 A. & E. 196.

(b) 12 A. & E. 822.

(c) 17 Q. B. 636.

1862. case from it; the ground of the decision being that, as the
 The QUEEN father of the pauper did not reside in the parish to which
 v. she had become chargeable, he could not be removable
 Inhabitants of to *Ireland*, and therefore, as her parents had no settle-
 NEWCHURCH. ment in *England*, she was removable to the place of her
 birth as the place of her settlement. If the matter were
 res integra, I should have been disposed to hold a differ-
 ent opinion: but, there being a decision of this Court
 directly in point, I think we ought to abide by it.

WIGHTMAN J. *Reg. v. Inhabitants of St. Giles without Cripplegate* (a) is a decisive authority for the respondents; and it follows *Reg. v. The Inhabitants of Preston* (b), in which the Court adopted the rule, that, subject to the exception that unemancipated children are to be removed with the head of the family, the children of *Irish* parents, born in this country, are settled in the place of their birth. It is a strong thing to say that a child, if unemancipated, has no settlement at all. In deciding for the respondents, we follow a decision in point, and one which I think is reasonable.

BLACKBURN J. The cases of *Reg. v. The Inhabitants of St. Giles without Cripplegate* (a) and *Reg. v. The Inhabitants of All Saints, Derby* (c) are conclusive: as Coleridge J. says in the latter case, p. 216-7, "It is an established principle that every *English* subject has a settlement by birth *primâ facie*; that is, till an acquired settlement is shewn; until then it is no more than *primâ facie*; and, when it is ascertained that the father or mother has an *English* settlement, that is the settlement

(a) 17 Q. B. 636.

(b) 12 A. & E. 822.

(c) 14 Q. B. 207.

of the child. But, if neither has one, or (which comes to the same thing) if neither has one which can be ascertained after search made, the *primâ facie* settlement, which always potentially exists, takes effect; I will not say, revives." That is applicable to the present case.

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I also think that, if the *Irish* father became chargeable, the child, while unemancipated, should be removed to *Ireland* with its father under the *Irish* Pauper Act; but here the father never has become chargeable by reason of relief given either to himself or his children, and is not liable to be removed; and therefore stat. 8 & 9 *Vict. c. 117.* does not apply.

Then looking at the Lunatic Act, 16 & 17 *Vict. c. 97.*: sect. 97 provides that the charges of maintenance shall be borne by the parish in which the lunatic is settled; and sect. 98 provides that if the lunatic is not settled in the parish by which he was sent to the asylum, and it cannot be ascertained in what parish he is settled, he shall be chargeable to the county. And the question is whether an unemancipated child born in *England* of an *Irish* father, not of an *Irish* pauper, is a person of whom it can be said, that "it cannot be ascertained in what parish he is settled." On the grounds I have stated, he has a birth settlement, though it is not available as long as the *Irish* Pauper Act does not apply; and therefore the parish of that settlement is to defray the expenses of his maintenance in the lunatic asylum.

MELLOR J. concurred.

Order of Sessions confirmed.

1862.

The QUEEN *against* JENKINS.

Friday,
November 8th.

18 & 19 Vict.

c. 121. ss. 13.

14. 20.

Nuisance.

Order to abate.

Penalty.

Where a person has been convicted, under sect. 14 of The Nuisances Removal Act for *England*, 1855, 18 & 19 Vict. c. 121., of disobeying an order to abate a nuisance under sect. 13, a warrant to levy the penalty imposed on the conviction cannot be issued without a previous summons under sect. 20.

THIS was a rule calling upon the *Cardiff* Local Board of Health to shew cause why a certain record of conviction, under the hand and seal of *Robert Oliver Jones*, Esq., stipendiary magistrate for the borough of *Cardiff*, bearing date the 15th *February*, 1861, whereby *Catherine Jenkins* was convicted of unlawfully disobeying an order made by that magistrate, dated 24th *August*, 1860, ordering her to cleanse certain pans and drains therein mentioned; and adjudging her for such offence to forfeit and pay the sum of 13*l.* 12*s.*; and ordering her to pay for costs to the prosecutors, the *Cardiff* Local Board of Health, the sum of 9*s.* 6*d.*, to be levied by distress in default of payment; and adjudging her, in default of sufficient distress, to be imprisoned in the house of correction at *Cardiff* for the space of two calendar months, unless the said several sums should be sooner paid;—and the several proceedings had thereon, should not be severally quashed.

The documents referred to in the rule had been brought up by certiorari.

The order of the 24th *August*, 1860, which was addressed to the defendant and the *Cardiff* Local Board of Health, after reciting a complaint under The Nuisances Removal Act for *England*, 1855, and service of a summons upon the defendant, proceeded as follows:—

"Now, upon proof here had before me that the nuisance so complained of doth exist on the said premises, and that the same is caused by the act or default of the owner of the said premises, I, in pursuance of the said Act, do order the said *Catherine Jenkins*, the owner, within seven days from the service of this order, or a true copy thereof, according to the said Act, to cleanse the said pans and drains, so that the same shall no longer be a nuisance or injurious to health as aforesaid. And if the above order for abatement be not complied with, or if the above order of prohibition be infringed, then I do authorize and require you, the said Local Board of Health, from time to time to enter upon the said premises, and do all such works, matters and things, as may be necessary for carrying this order into full execution according to the Act aforesaid."

"Given, &c.

"*Robert Oliver Jones* (L. s.)

"24th August, 1860."

The conviction was as follows :

<p>"<i>Glamorganshire</i>, Borough of <i>Cardiff</i>, to wit.</p>	}	<p>Be it remembered that on the 15th <i>February</i>, in the year of our Lord 1861, at a Police Court in the borough of <i>Cardiff</i>, in the said county, <i>Catherine Jenkins</i> is convicted before the undersigned, a stipendiary magistrate for the said borough, for that she the said <i>Catherine Jenkins</i>, within six calendar months then last past, to wit, on the 27th <i>September</i> then last past, and from thence daily and every day until the time of laying the information in this behalf, to wit, the 11th <i>February</i>, 1861, being a period of 136 days, being then and during such period the owner of certain premises situate in <i>Ellen Street</i>, within the said borough, unlawfully did not within such time, after due service of the order herein-</p>
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after mentioned on her according to the statute in such case made and provided, as therein is specified, obey, and did not during such period of 136 days as aforesaid obey, a certain order in writing, under the hand and seal of me the said stipendiary magistrate, dated the 24th August, 1860, whereby I, the said stipendiary magistrate, in pursuance of The Nuisances Removal Act for *England*, 1855, ordered the said *Catherine Jenkins*, as such owner as aforesaid, within seven days from the service of the said order, or a true copy thereof, on her according to the said statute, to cleanse certain closet pans and drains, belonging to the said premises; and the said *Catherine Jenkins* failed to satisfy me, the said stipendiary magistrate, that she had used all due diligence to carry out the said order: contrary to the statute in such case made and provided. And I adjudge the said *Catherine Jenkins* for her said offence, to forfeit and pay the sum of 2*s.* per day during her default as aforesaid, making together the sum of 13*l.* 12*s.*, to be paid and applied according to law, and also to pay to the *Cardiff* Local Board of Health, the prosecutors in this behalf, the sum of 9*s.* 6*d.* for their costs in this behalf; and if the said several sums be not paid forthwith, I adjudge the said *Catherine Jenkins* to be imprisoned in the house of correction at *Cardiff*, in the said county, for the space of two calendar months, unless the said several sums, and costs and charges of conveying the said *Catherine Jenkins* to the said house of correction, shall be sooner paid. Given under my hand and seal the day and year first above mentioned, at the Police Court in the borough aforesaid.

“ *Robert Oliver Jones* (L. s.) ”

The other proceedings referred to in the rule and brought up by certiorari, were a warrant of distress upon the goods of the defendant, dated 12th *July*, 1861,

which was according to the form (N. 1.) given in the Schedule to stat. 11 & 12 *Vict. c. 43.*; and a certificate that there were no goods of the defendant whereon to levy.

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It appeared, from the affidavits, that the service of the order to abate the nuisance was made on the 21st *August*, 1860; and that, on the 14th *February*, 1861, the defendant was served with a summons to answer an information for neglecting to obey that order; but no summons had been issued calling upon the defendant to shew cause why she should not pay the fine imposed in the conviction: also that the defendant had been imprisoned under a warrant issued on the conviction.

The following sections of The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121.*, are material.

By sect. 13, the justices may, by their order, require the person on whom it is made to abate a nuisance.

Sect. 14. "Any person not obeying the said order for abatement shall, if he fail to satisfy the justices that he has used all due diligence to carry out such order, be liable for every such offence to a penalty of not more than 10s. per day during his default"; &c.

Sect. 20. "Where any costs, expences, or penalties are due under or in consequence of any order of justices made in pursuance of this Act as aforesaid, any justice of the peace, upon the application of the local authority, shall issue a summons requiring the person from whom they are due, to appear before two justices at a time and place to be named therein; and upon proof, to the satisfaction of the justices present, that any such costs, expences, or penalties are so due, such justices, unless they think fit to excuse the party summoned upon the ground of poverty or other special circumstances, shall,

1862. by order in writing under their hands and seals, order
 The QUEEN him to pay the amount to the local authority at once,
 v. JENKINS. or by such instalments as the justices think fit, together
 with the charges attending such application and the
 proceedings thereon; and if the amount of such order,
 or any instalment thereof, be not paid within fourteen
 days after the same is due, the same may, by warrant
 of the said or other justices, be levied by distress and
 sale."

H. S. Giffard, in support of the conviction.—First.
 The conviction for disobedience of the order of the 24th
August, 1860, under sect. 14 of stat. 18 & 19 *Vict.*
c. 121., subjected the defendant absolutely to pay
 a penalty; and no further summons was necessary
 before proceeding to enforce payment of it. Sec-
 tion 20 does not apply to a case where a penalty has
 been imposed, under sect. 14, upon a person adjudged
 guilty of an offence in disobeying an order to abate a
 nuisance. The statute gives to justices a civil juris-
 diction in respect of damages or compensation to ind-
 viduals injured, and a criminal jurisdiction in respect
 of penalties for public nuisances. The words in sect. 20,
 "upon proof, to the satisfaction of the justices present,
 that any such costs, expences, or penalties are so due,
 such justices, unless they think fit to excuse the party
 summoned upon the ground of poverty or other special
 circumstances," shall order him to pay the amount, do
 not apply where there has been a conviction for an
 offence and a fine has been imposed. [*Cockburn C. J.*
 This is a penalty of 2*s.* per day during default: is the
 penalty to be levied without an opportunity being given
 to the party to shew cause why it should not be levied?
Wightman J. Under what provision in the Act is the

penalty under sect. 14 to be enforced?] By sect. 38, penalties imposed by the Act are recoverable according to the provisions of stat. 11 & 12 *Vict. c. 43*. [*Cockburn C. J.* To what cases, except those of a public nature, is the word “penalties” in sect. 20 to be referred?] Sect. 23 imposes a penalty for causing any water to be corrupted. [*Cockburn C. J.* That comes in a later stage of the Act; whereas the words in sect. 20 are, “where any costs, expences or penalties are due under or in consequence of any order of justices made in pursuance of this Act as aforesaid,” that is, by an order made by virtue of the preceding sections.] The provision for excusing the party upon the ground of poverty does not refer to cases of public offence. [*Mellor J.* It is more reasonable that a discretion to excuse or reduce the penalty should be given to the magistrate in the case of a public offence than of a private injury. *Cockburn C. J.* This is a complicated piece of machinery, and puts upon the party the harassing process of a second summons, whereas all might have been done at once by allowing the justices to convict the offender, and then the ordinary legal consequences would have followed; but the enactment in sect. 20 is express.]

Secondly, this objection does not go to the jurisdiction of the magistrate; *Ex parte Hopwood (a)*. [*Cockburn C. J.* The magistrate had no jurisdiction to issue his warrant except under sect. 20, and that section says that there shall be a fresh summons before the warrant is issued.] At any rate the conviction is good.

Brett, contra.—It is not sought to quash the conviction, only the warrant of distress and subsequent proceedings.

(a) 15 Q. B. 121.

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1862. COCKBURN C. J. The warrant of distress is wrong,
 The QUEEN and must be quashed, with the subsequent proceedings
 v. thereon. The conviction is right.
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WIGHTMAN and MELLOR JJ. concurred.

Rule absolute to quash the warrant
 of 12th *July*, 1861, and subsequent
 proceedings.

Friday,
November 8th.

Pauper
lunatic.
Maintenance.
Wife separate
from irre-
movable hus-
band.
16 & 17 Vict.
c. 97. ss. 97.
102.
11 & 12 Vict.
c. 111. s. 1.

The Guardians of EAST RETFORD Union, appel-
 lants, The Guardians of the STRAND Union,
 respondents.

A pauper lunatic, living by consent apart and in a different parish from her husband, who was irremovable by virtue of stat. 9 & 10 *Vict.* c. 66., was sent to a lunatic asylum, and an order for her maintenance was made upon the parish of her husband's settlement, under The Lunatic Asylums Act, 16 & 17 *Vict.* c. 97. s. 97. : Held, that the pauper lunatic was not irremovable by stat. 11 & 12 *Vict.* c. 111. s. 1., and therefore that the order was rightly made under sect. 97, and not under sect. 102. of stat. 16 & 17 *Vict.* c. 97.

AN order of two justices for the county of *Middlesex* adjudged the last legal settlement of *Ann Blenkarne*, a pauper lunatic, confined in the county lunatic asylum at *Hanwell*, to be in the parish of *East Retford*, in the county of *Nottingham*, and ordered the guardians of the poor of the *East Retford* Union to pay, on account of that parish, to the guardians of the poor of the *Strand* Union, certain sums, being the expences incurred in the examination and conveyance of the pauper lunatic, and in the maintenance of the pauper lunatic in the asylum, and to the treasurer of the asylum a weekly sum for her future maintenance.

Notice of appeal against the order having been duly given, the following case was stated under stat. 12 & 13 *Vict. c. 45. s. 11.*

The pauper lunatic, *Ann Blenkarne*, is the wife of *Charles Blenkarne*. He has resided for the last twelve years in the parish of *Monks Coppenhall*, in the *Nantwich* Poor Law Union, in the county of *Chester*, and is now residing there, and is irremovable therefrom by reason of stat. 9 & 10 *Vict. c. 66.* In 1824 he gained a settlement in the parish of *East Retford* by hiring and service; and it is admitted that the pauper lunatic is settled there through him. They were married in 1825, and lived together until about the year 1836. In that year they were living with their children in a lodging in *London*, and, in consequence of being unable to live happily together, *Charles Blenkarne* left his wife and went to reside in the country, and they have ever since lived apart, with the exception of one or two short periods when he came to see his wife and family in *London*. There were two daughters and a son by this marriage, and they lived with their mother when the father went away. *Charles Blenkarne* allowed his wife money for the support of herself and his children, which was regularly paid until about *February*, 1859, when such allowance was discontinued, because she had gone some months before to *America*, to take over a child of one of her daughter's, who had married and settled there. *Ann Blenkarne* returned to *London* about *May*, 1859, and she then went to live with one of her daughters at *Brompton*. After staying about ten months with this daughter, she took a room at No. 1, *Craven Buildings*, in the parish of *St. Clement Danes*, in the *Strand* Union, which she occupied for about a year previous to *March*,

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1861, when, having become insane, she was sent by the parish officers of *St. Clement Danes*, in due course of law, under the Lunatic Act, 16 & 17 *Vict. c. 97.*, to the lunatic asylum. As soon as she returned from *America* she received a weekly allowance from her husband, as before, towards her support, and he always knew where she was residing. He is now able and willing to contribute to her support. On the 22d *October*, 1861, the order adjudicating the settlement, &c. was made under stat. 16 & 17 *Vict. c. 97. s. 97.*

It was contended on the part of the appellants that, as the lunatic had no other settlement than that of her husband, and as he had resided for more than five years in the parish of *Monks Coppenhall*, an order ought to have been made upon the guardians of the poor of the *Nantwich* Union, under stat. 16 & 17 *Vict. c. 97. s. 102.*, who, it was contended, were bound to maintain the pauper lunatic.

It was contended, on the part of the respondents, that the order was properly made on the parish of settlement.

The question for the opinion of the Court was, whether, upon the facts above stated, the order of the 22d *October*, 1861, was rightly made. If the Court should answer this question in the affirmative, the order was to be confirmed; if in the negative, the order was to be quashed.

Keane, for the respondents.—By stat. 16 & 17 *Vict. c. 97. s. 102.*, the expences of a pauper lunatic removed to an asylum, who would, at the time of his being conveyed to such asylum, “have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision” in stat. 9 & 10 *Vict.*

c. 66., "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption &c." In the present case the pauper lunatic, who was living apart from her husband, was not irremovable, and therefore the order was rightly made upon the parish of her husband's settlement under sect. 97. The proviso in stat. 9 & 10 *Vict. c. 66. s. 1.*, which is altered in form only by stat. 11 & 12 *Vict. c. 111. s. 1.*, means that the wife shall not be removed from the parish in which the husband acquired irremovability. The pauper lunatic was neither by herself in her own person, nor by her husband, irremovable from the parish of *St. Clement Danes*. [He cited *Reg. v. The Inhabitants of St. Ebbe's*(a).]

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Poland, for the appellants.—By stat. 11 & 12 *Vict. c. 111. s. 1.*, the wife is entitled to the status of irremovability of her husband; and she is irremovable because he is so. [*Wightman J.* It is not proposed to remove the pauper lunatic from the place in which her husband has acquired irremovability.] Stat. 16 & 17 *Vict. c. 97. s. 102.*, which provides for the expences of pauper lunatics who are irremovable, does not speak of exemption from removal from the parish from which the pauper lunatic is conveyed to the asylum, but exemption "from removal to the parish of his settlement." In determining by what parish the expences of a pauper lunatic are to be paid, regard is to be had to his status of irremovability. Suppose the husband in the present case had become lunatic, and had wandered to another parish, the parish in which he had acquired the status of irremovability would be chargeable. [*Cockburn C. J.* That would be on the ground

(a) 12 Q. B. 137.

1862. that his act of leaving that parish was not the act of a
 sane person, and therefore he must be considered as still
 in that parish.] During the interval of her absence from
 her husband, the status of the wife follows that of the
 husband. If the wife was not lunatic, possibly she would
 not be irremovable, notwithstanding the irremovability
 of her husband. In *The Guardians of Leeds*, appts., *The
 Guardians of Wakefield*, respts. (a), where the wife, while
 temporarily absent from her husband, who had the
 status of irremovability in *Leeds*, became lunatic and
 was sent to a lunatic asylum, it was held that the order
 of maintenance was rightly made on *Leeds*, and not on
 the place of her settlement. [*Wightman J.* To bring
 the case within the words of stat. 16 & 17 *Vict. c. 97.*
s. 102., the wife must, at the time of being conveyed to
 the asylum, be resident in the parish in which her husband
 has acquired irremovability. In *The Guardians of Leeds*,
 appts., *The Guardians of Wakefield*, respts. (a), it was
 an accident that the pauper was seized with lunacy at
 the time of an excursion from her home for the benefit
 of her health : there was no break of the residence with
 her husband.]

COCKBURN C. J. This is a very clear case. An order
 could have been made for the removal of the pauper
 lunatic from *St. Clement Danes*, where she had acquired
 no settlement, though her husband could not be removed
 to the place of his settlement because he had acquired
 irremovability in *Monks Coppenhall*; and the question
 is, whether the enactment in stat. 11 & 12 *Vict. c. 111.*
s. 1. applies to such a case. [His Lordship read it.]
 The obvious intention of that enactment, and the pro-

(a) 7 *E. & B.* 258.

viso in the previous enactment, 9 & 10 *Vict. c. 66.*, was to prevent a wife or child from being removed from the head of the family to some other place of settlement which might otherwise have occurred when he had resided longer in a parish than the others. The Legislature could not have contemplated, as within the policy of such an enactment, the case of a wife living separate from her husband with her own consent. And the words used are not ambiguous: they are, that the wife and children shall "not be removable from any parish or place from which he or she would not be removable." Here it is not sought to remove the wife from the parish in which the husband is irremovable; and therefore the words do not apply. If the husband and wife had been living separate from each other in the same parish, there might be some question. But here, both on the words and the policy of the enactment, I think the order was rightly made on the parish of settlement.

WIGHTMAN J. As soon as it is admitted that the pauper, if not a lunatic, would not have been irremovable, the case for the appellants fails, because the 102d section of stat. 16 & 17 *Vict. c. 97.* applies only where the pauper is irremovable at the time of his being sent to the asylum. That section does not confer upon the pauper lunatic the privilege of irremovability from *St. Clement Danes*. But for that statute she would have been properly removable to the place of her husband's settlement. Stat. 11 & 12 *Vict. c. 111.* does not apply.

MELLOR J. concurred.

Order confirmed.

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Wednesday,
November 12th.

BLISS, appellant, LILLEY, respondent.

*Gunpowder.
Explosive
preparation
or composition.
Fireworks.
Fog signals.
23 & 24 Vict.
c. 139.*

By stat. 23 & 24 *Vict. c. 139. s. 6*, "The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature; (that is to say),—no such manufacture shall be carried on without such licence for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles; (that is to say), percussion caps 50 yards, ammunition 100 yards, fireworks 50 yards, fulminating mercury or other preparation or composition of equally explosive power 100 yards, from any dwelling house or any building in which persons not connected with the same manufacture are employed." Sect. 7 imposes a penalty for making percussion caps, or making or keeping ammunition, fireworks, fulminating mercury or other explosive preparation or composition, contrary to the Act. Sect. 9 imposes a penalty for throwing, casting, or firing any squib, serpent, rocket, or other firework in or into any thoroughfare or public place. By sect. 11 the county justices in Quarter Sessions, and the councils of boroughs, may license places for the making of loaded percussion caps, and for the making and keeping respectively of ammunition, fireworks, fulminating mercury, or other explosive preparations or compositions; and by sect. 13, such licenses may be granted conditionally upon precautionary measures being taken and maintained. Upon an information which charged *L.* with making and keeping fireworks, explosive preparations and compositions in a building wherein by the Act it was not lawful to make and keep them, it appeared that fog signals were manufactured and kept upon his premises, that he had not obtained a license for their manufacture, and that his premises were within the specified distance from other buildings. Fog signals are concave pieces of tin filled with gunpowder, and fitted with nipples and percussion caps, and then firmly attached to each other, in order to secure the greatest amount of explosive power. The only process carried on in *L.*'s premises was mechanical. Fog signals were made for and used by railway companies. When the fog is so thick that the ordinary signals cannot easily be seen, one of them is placed on the rails, and is exploded by the pressure upon the copper caps of the wheels of an engine passing over it, making a report, which is heard at a considerable distance. The construction of them is attended with some degree of danger to the persons employed in the manufacture. Held, by *Wightman, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that *L.* was liable to a penalty. *Seemle*, per *Wightman J.*, that fog signals are fireworks, and therefore *L.* was liable for making and keeping them contrary to sect. 7; and per *Blackburn and Mellor JJ.*, *L.* was liable for making them in a place not licensed, contrary to sect. 6.

CASE stated for the opinion of the Court, by the stipendiary magistrate of *Birmingham*, under stat. 20 & 21 *Vict. c. 43*.

On the 21st *January*, 1862, *Simeon Lilley*, the respondent, appeared before the stipendiary magistrate for the borough of *Birmingham*, upon a summons, issued at the instance of *James Bliss*, the appellant, acting on behalf of the Borough Inspection Committee, charging him with "unlawfully making and keeping, and causing to be made and kept, a certain quantity of fireworks, explosive preparations and compositions, (to wit) 100 fog signals, in a certain place (to wit) a building, there situate, wherein, by the said Act in that behalf, it was not then lawful to make and keep, or cause to be made and kept, such fireworks, explosive preparations and compositions:" contrary to stat. 23 & 24 *Vict. c. 139*.

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It was admitted that the fog signals hereinafter described were manufactured and kept upon the premises of the respondent; that he had not obtained a license for their manufacture, and that his premises were within the specified distance from other buildings.

The only question was, whether fog signals could be considered "fireworks," or such "explosive preparations or compositions" as were within the words and meaning of the Act.

A fog signal is thus constructed, and is used for the purpose after mentioned.

It consists of two concave pieces of tin of nearly equal size, which, when put together, form a box in shape like a watch, about $2\frac{1}{2}$ inches in diameter and $\frac{3}{4}$ inch in thickness. To the inside of one of them are attached three solid nipples like those of a gun, on each of which is placed an ordinary percussion cap. The cavity is then filled with common gunpowder, and the two pieces are attached to each other by pressure, the edges being made to unite in nearly the same manner as a glass is fixed in a watch.

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The only process carried on in the premises of the respondent is mechanical.

The metallic boxes and the nipples are there made, the copper caps placed on the nipples, the gunpowder (about $3\frac{1}{2}$ drachms in weight) inserted, and the boxes closed. The gunpowder and the copper caps are procured elsewhere.

The articles in question are made for and used by railway companies. When the fog is so thick that the ordinary signals cannot easily be seen, one of these "fog signals" is placed on the rails, and is exploded by the pressure upon the copper caps of the wheels of an engine passing over it, making a report, which is heard at a considerable distance.

The construction of them is undoubtedly attended with some degree of danger to the persons employed in the manufacture, and more than one accident has occurred. The danger consists in the amount of pressure required for closing the edges of the two pieces of tin. It is necessary that they should be firmly attached to each other in order to secure the greatest amount of explosive power; and for this purpose a screw press is used. If a few grains of gunpowder are allowed to remain on the edges when they are brought together, or if the pressure is so great as to bring down the upper side of the box upon the copper caps, ignition and an explosion of the gunpowder contained within will probably take place.

In support of the information it was contended that, even if the "fog signals" could not be considered "fire-works," the manufacture and keeping of them without a license and within the specified distances were prohibited by the statute, as being "preparations and compositions of an explosive nature;" whilst it was urged on behalf

of the respondent, first, that they could not be considered to be "fireworks," those being well known specific articles of commerce of a wholly different description; and, secondly, as regards "preparations and compositions of an explosive nature," it was contended that it appeared from the context (in that part of sect. 6 which specifies the distance within which the several articles shall not be manufactured,) that the statute applied only to such "chemical" preparations and compositions as are "of equally explosive power" with fulminating mercury, *e. g.*, gun cotton, fulminating silver, &c., and not to such mechanical preparations and compositions as were carried on in the premises of the respondent.

The magistrate was of opinion that the latter must be considered to be the proper construction of the Act, and upon that ground dismissed the summons.

If the Court should be of opinion that the information was improperly dismissed, the case may be remitted with such their opinion.

The case was argued, *November* 8th and 12th, on which latter day judgment was given.

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I. Spooner, for the appellant.—First. Fog signals are within stat. 23 & 24 *Vict. c.* 139. The words of the preamble are as general as possible; after reciting three previous statutes it proceeds: "and it is expedient to amend the law concerning the making, keeping, and carriage of gunpowder, and to regulate the making and keeping of other compositions of an explosive nature, and to amend the law concerning the manufacture, sale, and use of fireworks." The words of sect. 6 are still more general: it enacts that "The following regulations shall be observed with regard to the manufacture

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of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature ; (that is to say,)

“ No such manufacture shall be carried on without such license for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles ; (that is to say,)

“ Percussion Caps 50 yards,

“ Ammunition 100 yards,

“ Fireworks 50 yards,

“ Fulminating Mercury or other

preparation or composition of

equally explosive power . . 100 yards,

from any dwelling house or any building in which persons not connected with the same manufacture are employed.”

These fog signals are a preparation or composition of an explosive nature within that section ; the case finds that the manufacture of them is attended with danger to the persons employed in it, and that the danger consists in the degree of pressure employed “ in order to secure the greatest amount of explosive power.”

Secondly. The enactment in sect. 6 is divisible ; it contains an absolute prohibition of the manufacture of any preparation or composition “ of an explosive nature” without a license ; and then it goes on to provide that the manufacture of certain enumerated articles, including “ fulminating mercury or other preparation or composition of equally explosive power,” shall not be carried on within 100 yards from any dwelling house or building. Section 7 provides that the prohibited articles shall be

forfeited, and imposes a penalty for making percussion caps, or making or keeping "ammunition, fireworks, fulminating mercury, or other explosive preparation or composition" contrary to the Act,—without defining of what the composition shall consist, or what its particular strength shall be. By sect. 11, "it shall be lawful for the justices of the peace for each county or other division, at their General Quarter Sessions, or for the council of any borough, upon application made to them by any person, from time to time to license places for the making of loaded percussion caps, and for the making and keeping respectively of ammunition, fireworks, fulminating mercury, or other explosive preparations or compositions, and to determine the quantities of such articles respectively to be kept in any place so licensed, and to grant licenses to persons to sell fireworks." The words are general also in that section; and the clause empowering the justices or council to determine the quantities of such articles respectively to be kept in any place so licensed would have been unnecessary if sect. 6 limited these compositions in the manner contended for; because sect. 6, in the clause following that cited, defines, with reference to certain specified articles, what quantity shall be kept. In sects. 13 and 17, also, the words are general. [*Blackburn J.* The information seems to be for making and keeping explosive preparations and compositions in a building improperly situated, not for making and keeping them in a building for which a license had not been obtained.] The Court will amend the case if necessary for the determination of the question. Sect. 6 makes a distinction between the making and the keeping of articles of an explosive nature. [*Cockburn C. J.* The Court cannot alter the information. The magistrate

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1862. asks us whether he ought to have convicted upon it as it stands.]

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Then, as to the words "other preparation or composition of equally explosive power," in the second clause of sect. 6, upon which the magistrate declined to convict because these fog signals were not of equally explosive power as fulminating mercury; they must mean "other preparation or composition of similar explosive power," with reference to the dangerous effects of the explosive power, and not of a power equally explosive chemically considered. [*Cockburn C. J.* This is not the manufacture of an explosive article such as gunpowder; nor is it analogous to fulminating mercury.] The last clause in sect. 6 refers to gunpowder:—"Every person keeping or using any factory for the making of ammunition or fireworks shall have, at a distance of not less than fifty yards from any workshop connected with the manufacture, a magazine or magazines, built with brick or stone, for the receiving and safely keeping the gunpowder or other explosive materials used in the manufacture, and the cartridges or fireworks, (as the case may be) made at such factory." [*Wightman J.* That would include the case of this fog signal.] And the fulminating powder in it. [*Blackburn J.* Sect. 9 shews what the Legislature meant by fireworks:—"If any person throw, cast, or fire, or aid or assist in throwing, casting, or firing, any squib, serpent, rocket, or other firework, in or into any thoroughfare or public place, he shall for every such offence forfeit any sum not exceeding 5*l.*" A man putting a fog signal on the rail of a railway is not within that enactment.] If a man threw a fog signal into the street, and it exploded, he would be within sect. 9. [*Cockburn C. J.* A war or Congreve

rocket would not be a firework within the statute ; it is applied to a totally different purpose.] The word "rocket" is used in sect. 9 without any qualification.

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No counsel appeared for the respondent.

COCKBURN C. J. I am not satisfied that the magistrate was wrong in his decision. There is great difficulty in disjoining the two parts of the same clause in sect. 6 of stat. 23 & 24 *Vict. c.* 139., the first part of which requires a license in order to manufacture the specified articles, and the second part of which relates to the distances from buildings at which the specified articles shall be kept. However, the case is within the mischief contemplated by the Legislature ; and, as my learned Brothers think that a construction can be put upon the Act of Parliament which will warrant a conviction, I will not say anything to weaken the force of a decision to that effect.

WIGHTMAN J. The manufacture and keeping of these detonating articles called fog signals is clearly within the mischief contemplated by stat. 23 & 24 *Vict. c.* 139. I am disposed to think that they are fireworks ; and that they are a special species of cracker. If, on the 5th of *November*, or on some other occasion on which fireworks are usually let off, a person let off one of these fog signals in a thoroughfare or public place, he would be within sect. 9. [His Lordship read it.] I presume that an ordinary cracker would come within the term "firework" in that section ; and, if so, it seems to me that a fog signal would be equally within the mischief contemplated by it. I am disposed to think (though

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not without some doubt, because my brother *Blackburn* does not arrive at the same conclusion) that this is a "firework" within the meaning of the statute.

BLACKBURN J. I have also come to the conclusion that the magistrate, upon the case before us, ought to have convicted ; though not quite upon the same ground as my brother *Wightman*. I think that the magistrate was right in construing the term "fireworks," in the Act, to mean well known articles of commerce, of a different description from fog signals ; and therefore, as at present advised, I think he would have been wrong in convicting upon the ground that these fog signals were fireworks. But I think that, on another ground, he ought to have convicted the respondent. The information charged him with making and keeping a quantity of "fireworks, explosive preparations and compositions" in a building wherein it was not lawful to make and keep "such fireworks, explosive preparations and compositions." By sect. 7 a penalty of 10*l.* is imposed on every person making or causing to be made percussion caps, or other explosive preparation or composition, contrary to the Act. The question, therefore, which the magistrate had to determine was whether, when the respondent made these fog signals in these premises, he was there making an explosive preparation, contrary to the Act. Now sect. 6 enacts :—"The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury or any other preparation or composition of an explosive nature." On the facts it appears that these fog signals were preparations of an explosive nature just as much

as a percussion cap is a preparation of an explosive nature. Then sect. 6 goes on to say : " No such manufacture shall be carried on without such license for that purpose as hereinafter mentioned." It strikes me that, if the respondent carried on the manufacture of a preparation of an explosive nature without a license, he did so contrary to the provisions of this Act ; and, if the section stopped there, I think it would be plain enough that, when he carried on the manufacture of any article of an explosive nature (which I think a fog signal is) without a license, he incurred the penalty. Then, immediately after, the section goes on to say :—" Or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles ; (that is to say), Percussion caps 50 yards, Ammunition 100 yards, Fireworks 50 yards, Fulminating mercury or other preparation or composition of equally explosive power 100 yards." I attach a good deal of weight to the change of the word from " nature" to " power." The reason why the Legislature should prescribe a distance from a dwelling house within which this manufacture should not be carried on depends on the distance to which, in case of explosion, mischief would extend. Percussion caps and fireworks, which are assumed to be articles which would not explode with great violence, may be manufactured within fifty yards, because, beyond that distance, they would not explode so as to do mischief. If the articles are ammunition, or fulminating mercury, or other preparation or composition of equally explosive power, it is supposed that the explosion would be much more violent, and therefore they are not to be manufactured within 100 yards. But there may be articles and preparations of an explosive nature which are neither of these,

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and as to them the Legislature has specified no distance; and, according to my view of the enactment, a person making an article of an explosive nature which does not come within those descriptions for which certain distances have been specified, must get a license, whether the place in which he makes it is next door to a dwelling house, or in the middle of *Dartmoor*, many miles from one. This construction makes the statute not insensible legislation (though I say nothing in favour of the disposition of the sentences), because, by sects. 11 and 13, the justices may either refuse the license or they may grant their license conditionally upon precautionary measures being taken and maintained. In the present case, although I think that these fog signals are not fireworks, and so there is no provision as to the distance within which they may be made, still the respondent made them in a place which was not licensed; and therefore he acted contrary to the statute.

MELLOR J. We are all agreed that the case is within the mischief contemplated by stat. 23 & 24 *Vict. c. 139.*, and, upon the whole, I think that the words of sect. 6 are sufficient to warrant the construction contended for by Mr. *Spooner*, though I have felt some doubt in the course of the argument. Taking the 6th section together with the 11th, 12th and 13th sections, I have come to the same conclusion as that at which my brother *Blackburn* has arrived,—that, with reference to the manufacture of explosive matters generally, there must be a license, and the justices must exercise a discretion whether the place is proper in which that manufacture should be carried on;—but with reference to certain articles specified in the 6th section, namely “Percussion caps,

ammunition, fireworks, fulminating mercury or other preparation or composition of equally explosive power," the Legislature has not thought fit to leave that to the discretion of the justices, but has fixed certain distances from dwelling houses within which that manufacture must not be carried on even with a license; and therefore, in this case, the magistrate ought to have convicted the respondent.

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Case remitted.

SHARP, appellant, HAINSWORTH, respondent.

Wednesday,
November 12th.

Upon a complaint under stat. 20 G. 2. c. 19. s. 1., by an artificer against his master for nonpayment of wages, the justices may make a deduction from the wages on the ground that the work was badly done.

20 G. 2. c. 19.
s. 1.
*Master and
servant.
Wages.
Deduction.*

CASE stated by justices under stat. 20 & 21 Vict.
c. 43.

At a petty session for the West Riding of the county of York, held in *Bradford*, the information and complaint of *Abimelech Hainsworth*, the respondent: that *Henry Sharp*, the appellant, was justly and truly indebted to the respondent in the sum of 3*l.* 1*s.* 3*d.*, being wages for work and labour done and performed by him for the appellant, which said sum the appellant neglected and refused to pay, although the same had been lawfully demanded, contrary to the statute in that case made and provided: was heard and determined.

The respondent, who was a clothier, had been recently employed by the appellant, a blanket manufacturer, to

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weave blankets, the appellant supplying the weft and warp. The respondent claimed 3*l.* 1*s.* 3*d.* as wages for weaving, which the appellant resisted on the ground that the blankets delivered by the respondent were badly woven, and were not of the proper lengths; that if the respondent had woven the blankets according to order the price would have been 5*s.* each, and that they had been sold as spoiled goods at 2*s.* per blanket. The respondent stated that the materials supplied to him for weaving were bad, and that he wove the blankets as well as any man could with the materials he had.

The justices found that the respondent had made some of the blankets so woven by him for the appellant shorter, and others longer, than the respondent had been ordered to make them, and that the appellant had in consequence been obliged to sell them at a serious loss. But there was not sufficient evidence adduced to satisfy them that the blankets had been ill woven or the work ill done, save as to the improper lengths.

It was contended for the appellant that the justices were bound to deduct or set off the amount of the alleged damages arising from the improper lengths from and against the amount of the wages claimed, and that they were legally authorized to do so.

The justices adjudicated nevertheless in favour of the respondent, and made an order for the payment of the wages claimed, namely, 3*l.* 1*s.* 3*d.*, and that if that sum were not paid at the end of twenty-one days next after their determination, it was to be raised by distress and sale of the appellant's goods and chattels, and failing these the appellant was to be imprisoned for one month.

The question for the opinion of the Court was, whe-

ther the determination of the justices upon the facts and grounds stated was erroneous in point of law.

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Cleasby, for the appellant.—By stat. 20 G. 2. c. 19. s. 1., it is enacted, that complaints, differences and disputes which shall happen and arise between masters and artificers shall be heard and determined by one or more justice or justices of the peace, who is empowered to examine upon oath any such artificer or any other witness or witnesses touching any such complaint, difference or dispute, “and to make such order for payment of so much wages” to such artificer “as to such justice or justices shall seem just and reasonable.” In the present case there is a dispute between the master and the artificer; the master says, that the wages to be earned by the artificer were the money which would be due to him for making the blankets according to order, and that the wages agreed upon have not been earned. [*Wightman J.* Is the improper mode in which the blankets were made a set-off against, or forfeiture of, the wages?] The justices, in making an order for payment of wages, may take into account, as matter of deduction, that the work was not done, or was badly done. Where a person is employed to do anything to a chattel, and he does it improperly, the amount of loss suffered by the employer in consequence of the work being badly done is matter of deduction from the price agreed to be paid for the work. In an action for an agreed price of work, which is to be performed according to contract, it is competent for the defendant to shew that the work, in consequence of the nonperformance of the contract, is diminished in value; *Mondel v. Steel* (a), per *Parke B.*,
(a) 8 M. & W. 858. 870, 871.

1862. in delivering the judgment of the Court. [*Cockburn*
SHARP C. J. Stat. 20 G. 2. c. 19. s. 1. gives the justice or
v. justices power "to make such order for payment of so
HAINSWORTH. much wages" "as to such justice or justices shall seem
just and reasonable." In the present case the master
says the work is not done because it is spoiled; then the
justices may say, the amount of wages reasonably due is
so much less than that claimed by the loss which is
occasioned to the master by reason of the bad work.
Wightman J. Suppose a cross action by the master
against the servant for spoiling the goods by bad work,
the artificer might have some difficulty in setting up
this order as an answer; but the words of sect. 1 are
general, that the power of the justices is to order pay-
ment of so much wages as to them "shall seem just
and reasonable;" not "so much as was contracted for."]

No counsel appeared for the respondent.

COCKBURN C. J. The case must be remitted to the
justices with our opinion, that they may take into their
consideration the question whether the work was so
badly done that the master got no benefit from it, or
that the value of the work was so deteriorated as that
the whole amount of wages was not earned.

WIGHTMAN and BLACKBURN JJ. concurred.

MELLOR J. The justices may make a deduction from
the amount of wages claimed, on the ground that there
has not been a meritorious performance of the contract.

Case remitted.

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The QUEEN *against* the Inhabitants of St.
CLEMENT DANES.

Saturday,
November 15th.

An *Irish* woman unmarried, and not having any settlement in *England*, applied to the relieving officer of a union for an order of admission to the workhouse, stating that she was in distress and lived in *C.*, one of the parishes within the union, and expected her confinement that day. He declined to give her an order, but told her when she became bad to go to the workhouse and she would be admitted. In the evening of the same day, finding labour coming on, she went to the workhouse and told the master that she had applied to the relieving officer for an order without success, and that she was living in *C.*: she was admitted, and delivered of a child two hours after. The master entered the name of the mother in the books as "casual," and charged her and her child to the common fund; and, these entries having been laid before the guardians, the relief of the mother and child was charged to the common fund. After remaining in the workhouse a fortnight, the mother returned with her child to her former residence, and continued there for about twelve months; she then went with her child to *G.*, and after four months was admitted into a reformatory in *P.* The child was not admissible into it, and, becoming chargeable to *G.*, an order for its removal to *C.* was made with its mother's assent, notwithstanding stat. 9 & 10 *Vict.* c. 66. s. 3.: Held,

1. That the child was removable, the mother being unable to afford it nurture, and being already separated from it.
2. That the mother, when admitted into the workhouse, was chargeable to *C.* within the meaning of stat. 7 & 8 *Vict.* c. 101. s. 56., and, *semble*, also within the meaning of stat. 54 *G.* 3. c. 170. s. 3., and the child was therefore settled in that parish by reason of its birth in the union workhouse.

Age of nurture.
Removability.
9 & 10 *Vict.*
c. 66. s. 3.
Birth in workhouse.
Settlement.
54 *G.* 3. c. 170.
s. 3.
7 & 8 *Vict.*
c. 101. s. 56.

ON appeal to the *Middlesex* Quarter Sessions, in *April*, 1861, by the overseers of the parish of *St. Clement Danes*, against an order for the removal of *Mary O'Connor*, otherwise *McCarthy*, from the parish of *St. Giles in the Fields* to the parish of *St. Clement Danes*, the Sessions confirmed the order, subject to the following case.

Ellen O'Connor, otherwise *McCarthy*, the mother of the pauper child, being unmarried, was, on the 26th *November*, 1856, residing, and for nine months previously had resided, with her sister in *Vere Street*, in the parish of *St. Clement Danes*, in the *Strand* Union,

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earning her livelihood during the whole of such time by selling vegetables in the streets. She was an *Irish* woman, not having any settlement in *England*; she had never received relief; and, unless the application and admission hereinafter stated amount to chargeability, had never been chargeable to the said parish. On the 26th *November*, she, then being pregnant and destitute, walked to the offices of the *Strand* Union, situate in the parish of *St. Paul, Covent Garden*, which is the proper place for poor persons residing within the union to apply for relief. She there saw *Joseph Walker*, one of the relieving officers of the union, and asked him for an order for her admission into the workhouse, being, as she said, in distress, and expecting to be confined every day; she also told him that she lived at her sister's in *Vere Street*, in the parish of *St. Clement Danes*. He said he would call there to ascertain the truth of what she had said. He said he could not give her an order for admission into the workhouse, but that when she was taken bad she was to come again to the office; she replied that she expected to be put to bed that day; he then said that she might not be taken bad so soon, and that if she was taken bad she was to come to him for an order, or if there was not time she might go to the workhouse of the union in *Cleveland Street*, and she would be admitted. [It was admitted during the argument that the workhouse of the *Strand* Union was locally situated out of the union, and in the parish of *St. Pancras*.] She did not know, before he told her, where the union workhouse was; she then returned to the house in *Vere Street*, where she was living. On the same day the said relieving officer called there, and ascertained that the statements made by *Ellen O'Connor* were

true, but he declined to give her an order for admission into the workhouse, and said that when she became bad she was to go to the workhouse. On the same evening, finding labour coming on, *Ellen O'Connor* walked from her residence to the union workhouse; when she arrived there she was in a state of prostration; she first saw the porter, who fetched the master of the workhouse; she told him that she was in labour; he asked her why she had not applied at the union office for an order of admission, to which she replied that she had done so without success; she also told him that she was living in *St. Clement Danes*, and had been so for nine months previously. She was then admitted into the workhouse, and was delivered of a child (the pauper) about two hours after admission. She was suffering from pregnancy only, and after remaining for a fortnight in the workhouse, she voluntarily returned to her former residence in *Vere Street*, taking her child with her, where she continued to reside for about twelve months, supporting herself and it in the same way as before. She then went with her child and her sister into *St. Giles'*, the removing parish, where she continued to reside about four months. She was then taken into an asylum called *The Home of Hope*, situate in *St. Pancras*, which was a private charity establishment for the purpose of reforming unfortunate girls and procuring them situations. Not being allowed to take her child into the asylum, she left it with her sister in *St. Giles'*, who promised to take care of it during her absence. This she did for a short time, when, becoming unable to maintain the child any longer, she took it to *St. Giles'* workhouse, where it was at once admitted. An officer of *St. Giles'* parish saw the mother, and she consented to the removal of the child under the

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1862. present order; and it is found by the Sessions that the removal was for the child's benefit. The relieving officer, to whom application was first made, had authority to give an order of admission to the mother; he made no entry of the application having been made; but, when she was admitted into the workhouse, the porter of the union made an entry in a book kept by him, called the Rough Admission and Discharge Book, to the effect following, "*Wednesday, 26th November, 1856, M^cCarthy, Ellen, age 20;*" and the master added "Casual, C. F." to this entry; "C. F." meaning common fund. The master's admission and discharge book, kept by him in pursuance of the orders of the Poor Law Board, contained entries in his handwriting of the day of the month and the day of the week respectively on which the mother was admitted into the workhouse, and her child was born; and the following are extracts:—

Name.	Parish to which charged.	By whose order admitted.	If born in the House, name of the Parent.	Cause of seeking relief.	Observations on condition at the time of admission, and other general remarks.
<i>McCarthy, Ellen</i>	Common Fund.	The Master.		Destitution and Illness.	In labour.
<i>McCarthy, Mary.</i>	Common Fund.		<i>Ellen McCarthy.</i>		

It was proved to be the practice of the master of the union workhouse to enter persons as "casual" who were admitted by him without an order, unless he knew them to be settled in one of the parishes in the union; he stated he would have done so in this instance if he had known that the applicant had been living nine months in one of those parishes. These entries having been laid before the guardians, the relief of *Ellen O'Connor*

and her child while in the workhouse was charged to the common fund of the union.

It was contended, by the respondents, that the pauper child could, under the circumstances above mentioned, lawfully be removed without its mother to the place of its settlement, and that such child was settled in the appellants parish, by reason of its birth in the union workhouse, by virtue of the provisions of the stats. 54 G. 3. c. 170. s. 3. and 7 & 8 Vict. c. 101. s. 56., and the other statutes in that behalf; and that the relief of *Ellen O'Connor* and her child, while in the *Strand* Union workhouse, was wrongfully and illegally charged to the common fund.

On the other hand, it was contended, by the appellants, that the pauper child being within the age of nurture could not be removed without the mother; and that the pauper child acquired no settlement in the appellants parish by reason of its birth in the workhouse of the *Strand* Union.

If the Court should be of opinion that the pauper child could be removed without her mother, and that she acquired a settlement in the parish of *St. Clement Danes*, by reason of her birth in the union workhouse, then the order of removal and the order of Quarter Sessions were to be confirmed; but if the Court should decide either of these questions in the negative the orders were to be quashed.

Poland, for the respondents.—First. The child, though within the age of nurture, might be removed to the place of her settlement without her mother. Her mother, being absent and in another parish, could not be removed with her; for the parish of *St. Giles* had

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no controul over the mother. Suppose the mother was dead, or had deserted her child, and could not be found? [Blackburn J. The present case is within the principle of the decision in *Reg. v. The Inhabitants of Combs (a)*, which, as it appears Coleridge J. dissented, must have been well considered.] That case was stronger than the present, because relief to the children was relief to the mother, and she might have been removed with them.

Secondly. The mother, being an *Irish* woman and having no settlement, her child was settled in the parish of its birth. And though the birth in fact took place in the parish of *St. Pancras*, in law it took place in the parish from which the mother was sent to the workhouse. By stat. 54 G. 3. c. 170. s. 3. the child, so far as regards its settlement, is to be deemed and taken to be born in the parish by which the mother was sent to, and on account of which the mother was received and maintained in the workhouse. The mother applied for admission into the workhouse as a parishioner of *St. Clement Danes*; and, as she could only be sent there as resident in one of the parishes of the union, she was virtually sent to the workhouse by the relieving officer of the union as agent for the parish of *St. Clement Danes*; so that in law she was received and maintained in the workhouse as a parishioner of *St. Clement Danes*, though she was entered as casual poor, and charged to the common fund of the union. Casual poor are defined in *Archb. Poor Law*, 335, 10th ed., to be "those poor persons who are not settled in the parish nor reside there, but who happen casually to be there at a time when, from some accident occurring to them, or from their being suddenly afflicted

(a) 5 E. & B. 892.

with some illness, they are obliged to resort to the parish officers for relief." Further, stat. 7 & 8 *Vict. c. 101. s. 56.* enacts that, for the purposes of relief, settlement, &c., the workhouse of any union or parish shall be considered as situated in the parish to which each poor person to be relieved or otherwise concerned in any such purpose is or has been chargeable. Here the mother was legally chargeable to the parish of *St. Clement Danes*, and the birth of the child must be taken to have been in that parish. [He was then stopped.]

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Keane (Le Breton with him), for the appellants.—First. The child could not be removed without its mother, who was able to earn her livelihood and support it, and there was no abandonment of it by her. [*Cockburn C. J.* It would be an idle proceeding to summon the mother: she could not earn anything in the Reformatory.]

Secondly. To bring the case within stat. 54 *G. 3. c. 170. s. 3.*, or stat. 7 & 8 *Vict. c. 101. s. 56.*, the mother must have been actually chargeable to the parish of *St. Clement Danes*. Art. 88 of the Consolidated Orders of the Poor Law Board, *Archb. Poor Law*, p. 307, 10th ed., which by stat. 4 & 5 *W. 4. c. 76. s. 42.* have the force of an Act of Parliament, directs that a pauper shall be admitted into the workhouse "without any order, in any case of sudden or urgent necessity." Therefore it was the duty of the master of the union workhouse to admit the woman, under the circumstances in which she was, without an order; and then the relief given to her was properly charged to the common fund. [*Mellor J.* Art. 88 does not direct the relief to be charged to the common fund.]

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By Art. 90, *Archh. Poor Law*, 307, 10th ed., "If a pauper be admitted otherwise than by an order of the board of guardians, the admission of such pauper shall be brought before the board of guardians at their next ordinary meeting, who shall decide on the propriety of the pauper's continuing in the workhouse or otherwise, and make an order accordingly." The guardians approved of the act of the master of the workhouse, and treated the mother as casual poor. [*Cockburn C. J.* Art. 88 of the Consolidated Orders of the Poor Law Board rendered it the duty of the master of the union workhouse to receive her, though she was not entitled to be taken in as casual poor. That order did not contemplate the case of a union workhouse out of the union.]

Poland was not called upon to reply.

COCKBURN C. J. On the first point, there is no distinction between the present case and *Reg. v. The Inhabitants of Combs (a)*; and, though one member of the Court dissented from the decision in that case, we adhere to it. The principle of the enactment in stat. 9 & 10 *Vict. c. 66. s. 3.* applies only where the child is residing with its mother; when it is absent from its mother the principle has no application.

As to the second point, if our decision depended on stat. 54 *G. 3. c. 170. s. 3.*, I should have some doubt; though the inclination of my opinion under the circumstances of the present case is, that the mother was not only sent to the workhouse of the union in which the parish of *St. Clement Danes* is situate, by and on behalf of that parish, but was also received and maintained there

(a) 5 *E. & B.* 892.

on account of that parish. But it is not necessary to decide that question, because our decision that the order is good may rest upon stat. 7 & 8 *Vict. c. 101. s. 56*, the effect of which is that where a pauper is born in the workhouse of a union or parish the birth shall be considered as taking place in the parish to which the mother, at the moment at which she is entitled to relief, is chargeable. That enactment does not use the phrase "actually chargeable;" and I think that as soon as a poor person is entitled to relief he is chargeable within its meaning. In the present case, the woman, being far advanced in pregnancy, applied to the relieving officer of the union for an order of admission into the workhouse, and told him her condition, and pointed out to him that she was a parishioner of *St. Clement Danes*, and that she was entitled, as such parishioner, to an order. It appears that her confinement was then so imminent that her admission into the workhouse would have been a proper precaution on the part of the relieving officer; but, instead of giving her an order, he told her to go there at a later stage. In conformity with this verbal direction and authority of the relieving officer she applied to the master of the workhouse for admission, in her character of parishioner, at a time when it cannot be disputed that she was entitled to relief. At that moment she was chargeable to the parish of *St. Clement Danes*, in the sense of being entitled to immediate relief; and, the mother being chargeable to that parish, and being admitted into the workhouse as a parishioner of that parish, the child born there must be considered as born in that parish, and not in the parish of *St. Pancras*.

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WIGHTMAN J. The question whether this woman was

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or was not chargeable to the parish of *St. Clement Danes* turns on the meaning of stat. 7 & 8 *Vict. c. 101. s. 56.* I have had some doubt, and I am not now altogether free from doubt. But I think it is too much to say that a woman whose labour is imminent is not a pauper, and is not chargeable. Here, though the woman was not actually receiving relief, yet, in the same evening, she was in circumstances which required that relief should be given to her; and I think that it would be too narrow a construction of the statute to hold that she was not chargeable.

BLACKBURN J. Whenever an impotent person, on account of poverty, becomes entitled to relief, he becomes chargeable to the parish which ought to relieve him, within the meaning of the statutes relating to the relief of impotent poor. This is not the case of the breaking of a limb, or other accident, which makes a person casual poor; but the fact of the woman being very poor, and in an advanced state of pregnancy, brought her within the class of impotent persons entitled to relief from the parish. It may be that the applying to the relieving officer of the union, and being told to go to the workhouse, constituted chargeability within stat. 54 *G. 3. c. 170. s. 3.*; but it is not necessary to decide that, because, as soon as she went to the workhouse, and was received there, she was chargeable within stat. 7 & 8 *Vict. c. 101. s. 56.*, which adds to and extends the former Act. In stats. 8 & 9 *W. 3. c. 30. s. 1.* and 35 *G. 3. c. 101. s. 1.* the Legislature have said that a poor person shall not be removed until he has become actually chargeable; but that is a very different matter from the present case, where the question is as

to a child being considered to be born in the parish in which its mother had a right to be relieved.

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MELLOR J. Under the circumstances of this case, it is the same as if the union workhouse was in the parish to which the woman was chargeable. There are no facts to shew that she was not received into the workhouse as of the parish to which it should turn out, upon investigation, that she was chargeable. I think the effect is that she was received into the workhouse on account of the parish of *St. Clement Danes*.

Orders confirmed.

HARDCASTLE, appellant, JONES, respondent.

Saturday,
November 15th.

S. B., under thirteen years of age, was employed in "skutching" goods which had been previously printed: she was employed in a room or shed, in which "finishing" alone was carried on, but which had an internal and direct communication with print-works, in which all the processes incident to the chief process of printing were carried on: Held, that *S. B.* was employed in a print-work within the meaning of stat. 8 & 9 *Vict. c. 29. s. 2.*, whether "skutching" was an "incidental printing process" or not; and therefore a surgeon's certificate was required by sect. 20.

Print-works
Act, 8 & 9
Vict. c. 29.
ss. 2. 20.
"Finishing."
"Skutching."
Employment
of child.

CASE stated by justices, under stat. 20 & 21 *Vict. c. 43.*

At a Petty Sessions, held at *Bolton*, in the county of *Lancaster*; upon an information and complaint preferred by the appellant, *David Jones*, one of Her Majesty's sub-inspectors of factories, against the respondent *James Hardcastle*, of the township of *Bradshaw*, in that county, bleacher, finisher, and calico printer, carrying on business under the name of *James Hardcastle & Co.*, under The Print-works Act, 8 & 9 *Vict. c. 29.*, which

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charged that *James Hardcastle & Co.*, being the occupiers of a certain print-work within the township of *Bradshaw*, the same being a print-work within the true intent and meaning of the said Act, did employ *Sarah Blackburn*, being a child within the meaning of the said Act and a person for whom a surgical certificate was required by the said Act to be given, according to the form and direction contained in the Schedule A. annexed to the said Act, in the said print-work, they the said *James Hardcastle & Co.* not having, before or within seven working days after they so employed the said *Sarah Blackburn* as aforesaid, obtained the surgical certificate required to be given as aforesaid, contrary to the said Act; the appellant was duly convicted and adjudged to forfeit and pay the penalty of 2*l.* under the said Act.

The appellant is the occupier of works at *Bradshaw*, at which works bleaching, printing and finishing are carried on.

On the 15th *November*, 1860, *Sarah Blackburn* was employed in "skutching" goods which had been previously printed. It was admitted that *Sarah Blackburn* was a "child" within the meaning of the 2d section of The Print-works Act, and that no surgeon's certificate had been obtained within the meaning of sect. 20 of the Act. In the room or shed where *Sarah Blackburn* was so employed there were no persons whatever employed in printing figures, patterns or designs, by means of blocks or cylinders or any other means, on any fabric whatsoever. The only processes which were carried on in that room, or on which *Sarah Blackburn*, ever was employed by the appellant, were all processes of "finishing," to which, if required, goods sent to the appellant were subjected, whether they had been bleached

or printed by the appellant or were sent to him in a bleached or printed state for the purpose of being finished only. The processes of printing figures, patterns or designs, by means of blocks, cylinders or otherwise, and the preparing, dyeing, bleaching, cleansing, calendering, dressing or finishing, incident or necessary to the completion of the chief process of printing figures, patterns or designs upon the fabrics, were not carried on in the room or shed where *Sarah Blackburn* was employed, but had been previously completed in the print-works belonging to the appellant, and having an internal and direct communication with the room in which *Sarah Blackburn* was so employed.

"Skutching" is the first process used in "finishing" woven fabrics, and on the day in question *Sarah Blackburn* was employed in skutching white and grey goods, as well as printed goods, in the before mentioned room. There are numerous works in the district where bleaching and "finishing" are carried on, but no "printing," and vice versâ. There are also many establishments where finishing alone is carried on.

It was contended, on the part of the appellant, that "skutching" is not a process either incident or necessary to the chief process of printing.

On behalf of the respondent it was contended, that "skutching" is a process of finishing incident to the completion of the chief process of printing.

The question for the opinion of the Court was, Whether *Sarah Blackburn* was employed, on the day in question, in a print-work within the meaning of The Print-works Act. If the Court should be of opinion that she was so employed, then the conviction was to

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then the conviction was to be quashed.

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Welsby, in support of the conviction.—By sect. 20 of The Print-works Act, 8 & 9 *Vict. c.* 29., “no child” (which by the interpretation clause, sect. 2, means a child under the age of thirteen years) “shall be employed in a print-work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgeon’s certificate, according to the form and directions given in the Schedule (A.) to this Act annexed, in proof that such child has the ordinary strength and appearance of a child of at least eight years of age, and is not incapacitated by disease or bodily infirmity from working daily in a print-work, as allowed by this Act.” By the interpretation clause, sect. 2, it is enacted that in that Act, “unless another sense shall be plainly shewn by the context, or by some positive enactment to the contrary, the words ‘Print-work’ shall be taken to mean any building or shed, and any part thereof, within which any persons are employed to print figures, patterns, or designs, by means of blocks or cylinders, or by means of any other tool, instrument, or mechanism, upon any woven fabric of cotton, wool, hair, fur, silk, flax, hemp, or jute, either separately or mixed together, or mixed with any other material; or upon any felted fabric of wool or fur, either separately or mixed with any other material; or upon any cotton, linen, woollen, worsted, or silken yarn; and the words ‘incidental printing process’ shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing incident or necessary to the completion of the chief process of

printing figures, patterns, or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on." . . .

"And any person who shall work in any print-work, whether for wages or not, or as a learner or otherwise, either in printing or in any incidental printing process, or in cleaning any part of the print-work, or in cleaning any block, cylinder, tool, or machine used therein, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed to be employed therein within the meaning of this Act." . . . "And any part of such print-work may be taken to be a print-work within the meaning of this Act; but this enactment shall not extend to any part of such buildings used solely for the purposes of a dwelling house; and nothing in this Act contained shall extend to any person, being a mechanic, artisan, or labourer, working only in making or repairing the machinery or any part of the print-work."

The case finds that *Sarah Blackburn* was employed in a room or shed in the appellant's print-works, which room or shed had an internal and direct communication with the main part of the building, in which the process of printing was carried on. The question is, not upon what work she was employed, but whether she was employed in a part of the main building within the meaning of the Act. [*Cockburn C. J.* What she was employed upon may throw some light on the main question.] It appears from the case that "skutching," upon which *Sarah Blackburn* was employed, is the first process in "finishing;" and that process, as used in bleaching and dyeing works, must be understood as incidental

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1862. to printing; *Howarth*, appt., *Coles*, respt. (a): so that
HARDCASTLE she was employed in a process incidental to printing.
 v. [Blackburn J. The justices do not find that the work
 JONES. on which *Sarah Blackburn* was employed is an "in-
 cidental printing process." Cockburn C. J. Suppose
 a manufacturer employed his domestic servant being a
 young person, to wash his family linen in a room com-
 municating with a building in which print-works were
 carried on, would that be within sect. 20?] In such a
 case the person would not be employed in printing, or in
 any process incidental to it. [Cockburn C. J. Suppose
 the process of "skutching" was carried on in another
 building?] The object of the statute is to protect
 children from being employed without a certificate in
 any process of printing in any room which is part of
 the building in which print-works are carried on; and
 the room in which *Sarah Blackburn* was employed is, by
 sect. 2, part of a print-work. The only difficulty arises
 from these lumbering interpretation clauses. [Cockburn
 C. J. Which are inserted to save the framer of the Act
 the trouble of seeing what the effect of each section is.]

Cleasby (*Davison* with him), for the appellant.—The
 present case is not within the mischief contemplated by
 stat. 8 & 9 Vict. c. 29., nor within the words of sect. 2.
 Deleterious acids are not used in the process of "skutch-
 ing," upon which *Sarah Blackburn* was employed: nor
 is "skutching" incidental to the process of printing.
 The case finds that the "finishing" incident to the com-
 pletion of the process of printing figures, patterns, or
 designs had been done in the print-works, and not in
 the room where *Sarah Blackburn* was employed. In

(a) 12 C. B. N. S. 139.

Howarth, appt., *Coles*, respt. (a), it was held that the process of "finishing" was not within The Bleaching and Dyeing Works Act, 23 & 24 *Vict. c. 78.*, unless it was incidental to the operation of bleaching and dyeing.

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Neither was *Sarah Blackburn* employed in a "print-work" within the meaning of stat. 8 & 9 *Vict. c. 29.* The room or shed in which she was employed was a separate part of the building. In order to bring a case within the Act, some one of the processes of printing must be carried on in the part of the print-work in which the child is employed, and "any part thereof" in sect. 2 must be a part of the building or shed in which such process is carried on.

Welsby, in reply.—Whether the work on which *Sarah Blackburn* was employed was incidental to printing or not, she was employed in a part of a print-work, and in a kind of work not excepted by the exception at the end of sect. 2. The employment of children and persons of weak health in any part of a building in which those unwholesome processes are carried on is within the mischief contemplated by the Legislature.

COCKBURN C. J. The question is not free from doubt, owing to the ambiguous language of stat. 8 & 9 *Vict. c. 29.*, and the somewhat confused manner in which the case is stated; but, upon the whole, I am of opinion that the conviction is right, and ought to be sustained. The language of the interpretation clause, sect. 2, is ambiguous; but the present case is within the mischief which it was the object of the Legislature to remedy; and that mischief is the employment of young children,

(a) 12 *C. B. N. S.* 139.

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except on satisfactory proof of their having acquired sufficient strength, and being otherwise in a healthy condition, in buildings where the work of printing woven fabrics is carried on, and where one can well understand that strong acids, and other deleterious substances incidental to that species of manufacture, are used. It is indispensable to the object of the Legislature that the provisions of the Act should extend to the accessory parts of the building, which must be more or less within the influence of the deleterious compounds used in the process of printing.

Sect. 20 prohibits the employment of a child in a print-work until the occupier thereof shall have complied with the regulations therein specified; then, by the interpretation clause, sect. 2, "print-work" is explained to mean "any building or shed, *and* any part thereof, within which any persons are employed to print figures, patterns or designs." It then goes on to explain what is intended by the words "incidental printing process." The only other part of the clause which it is necessary to refer to is the definition of the term "employed;" and the question is, whether it comprehends this case, that is, whether this child was employed in a print-work within the meaning of the Act,—the term print-work including "any part of the building," and the term "employed" including "any person who shall work in any print-work, &c., either in printing or in any incidental printing process, &c., or in any other kind of work whatsoever, &c." The process of "skutching" is either within the term "incidental printing process," or within the comprehensive words "any other kind of work whatsoever." But it is unnecessary to consider the former alternative, which is a question of fact;

because, at all events, this child was employed in some kind of work in a part of a building within which the process of printing was carried on, and therefore was employed in a print-work within the meaning of the Act.

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BLACKBURN J. (The only other Judge present.) I also am of opinion that the conviction was right, though there are several difficulties in this case, and in the construction of the statute as applied to it. It seems clear that the child was employed in a room forming a portion of a building in other parts of which printing works were carried on. I cannot understand that she was in a building or shed separate and distinct from the main building; for it is found by the case that there was an internal and direct communication between them. Then what was *Sarah Blackburn* doing there? She was engaged in one of the processes used in "finishing;" and I guess, from the statement in the case, that there is some finishing which is necessary in the process of printing, and also some which is not necessary; and it is not clear on which she was employed; and therefore, if it were necessary, we should send back the case to the justices for further information on that point. But it is not so, because I take the same view as the Lord Chief Justice. Supposing *Sarah Blackburn* was employed in a process which we may call superfluous finishing, she was still employed in a print-work as defined by the interpretation clause, sect. 2 of stat. 8 & 9 *Vict. c. 29*. Looking at the first part of that section by itself, I should think that a person employed in a print-work would be one employed in

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the process of printing, not one employed in separate work though in the same building. But the word "print-work" is to be taken to mean "any building or shed, and *any part thereof*," and this room is part of a building within which the process of printing is carried on, and therefore part of a print-work; and then the word "employed" is to be taken to mean "any person who shall work in any print-work, either in printing or in any incidental printing process, &c., or in any other kind of work whatsoever, &c." *Sarah Blackburn* was not employed in printing, nor, as I take it, in an incidental printing process; but she was employed in some other kind of work ejusdem generis. I should doubt whether a person who swept and cleaned the premises, or brought in their dinner to the work people, would be within the Act. But the present case is within the general words; and the exceptions of a dwelling house, and of mechanics, artisans or labourers making or repairing the machinery or any part of the print-work, strongly confirm the interpretation which we put upon those words; because they shew that the Legislature thought that the general words used by them rendered it necessary to introduce an exception, when one was intended.

Conviction affirmed.

[1861.]

AUBERT and another *against* GRAY.[Tuesday,
April 23d.]

1. The clause in an ordinary policy of marine insurance on a ship and goods which insures against losses occasioned by "arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition or quality soever," applies to a seizure of the ship in consequence of an embargo laid on her by the Sovereign of the country of the assured, for the purpose of carrying on a war with another power; per *Crompton* and *Blackburn* JJ. in this Court: and affirmed in the Exchequer Chamber, per *Erle* C. J., *Williams* and *Keating* JJ., and *Bramwell* B.; dubitante *Pollock* C. B.

Marine insurance.
Restraints of
princes, &c.
Hostilities.

2. There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, and an embargo connected with such hostility: per the same Judges in the Exchequer Chamber.

3. *Quere*, if the act of seizure was a lawful act under the municipal law of the country of the assured? per the same Judges in the Exchequer Chamber.

THE declaration alleged that the plaintiffs, on the 3d October, 1859, according to the usage and custom of merchants, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that the plaintiffs, by the name of *Aubert, Powell & Co.*, or as agents, as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, should or might appertain, in part or in all, did make assurance, and did cause themselves and them and every of them to be insured, lost or not lost, at and from *London* to *Alicante*, with liberty to call at any intermediate port or ports, including all risk of craft, upon any kind of goods and merchandizes, and also upon the body, tackel, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called *The Jovellanos*, whereof was master under God for the said voyage
, or whosoever else should go for master in

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the said ship, or by whatsoever other name or names the said ship, or the master thereof, was or should be named or called, beginning the adventure upon the goods and merchandizes from the loading thereof aboard the ship as above, upon the ship &c., and should so continue and endure during her abode there upon the ship &c. ; and, further, until the ship, with all her ordnance, tackel, apparel &c., and goods and merchandizes whatsoever, should be arrived at as above upon the ship &c. until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed. And it should be lawful for the ship &c., in the voyage, to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever without prejudice to the insurance. The ship &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers in the policy, were and should be valued at 1800*l.* on B. R. Y. thirty bales of carpets so valued, general average and charges as per foreign statement, if so made up. Touching the adventures and perils which they, the assurers, were contented to bear, and did take upon themselves in the voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, *arrests, restraints and detainments of all kings, princes, and people, of what nation, condition or quality soever*, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or should come to the hurt, detriment or damage of the goods and merchandizes, and ship &c., or any part thereof ; and, in case of any loss or misfortune, it should be lawful to

the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the goods and merchandizes, and ship &c., or any part thereof, without prejudice to the insurance, to the charges whereof they, the assurers, would contribute each one according to the rate and quantity of his sum therein assured. And it was agreed by them, the assurers, that the said writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*. And so they, the assurers, were contented, and did thereby promise and bind themselves, each one for his own part, their heirs, executors and goods to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for the said assurance by the assured at and after the rate of 20 shillings per cent. And by a certain memorandum, thereunder written, corn, fish, salt, fruit, flour and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides and skins were warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general, or the ship should be stranded. And thereupon, in consideration of the premises, and that the plaintiffs had paid to the defendant the sum of 20*s.* as a premium or reward for the insurance of 100*l.* of and upon the premises in the policy mentioned, the defendant then became and was an insurer, and duly subscribed the said policy of insurance as such insurer of the sum of 100*l.*, upon

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the said goods in the said ship or vessel, for the said voyage in the said policy of insurance mentioned. The declaration then averred that the goods mentioned in the policy, to wit, thirty bales of carpets, of great value, had been and were shipped and loaded at *London* aforesaid, in and on board the ship or vessel in the policy mentioned, to be carried and conveyed thereon on the voyage in the policy mentioned, and that they the plaintiffs, one *Bonifacio Ruiz de Velasco*, and certain persons carrying on business under the name, style or firm of *Bonifacio Ruiz de Velasco*, some or one of them, were then and continually thence, until and at the time of the loss &c., interested in the goods in the policy mentioned and so shipped on board the ship as aforesaid, to a large value and amount, to wit, the value and amount of all the moneys by them ever insured or caused to be insured thereon : and that the insurance was made by *Aubert, Powell & Co.* for the use and benefit and on the account of the person or persons so interested as aforesaid. It then alleged that the said ship or vessel, with the said goods on board thereof, departed and set sail from *London* aforesaid on her said voyage in the said policy mentioned : and that afterwards, and during the continuance of the risk in the policy mentioned, the goods so insured as aforesaid, by perils, losses and misfortunes insured against by the said policy, became and were greatly damaged, injured, spoiled and deteriorated in value, and thereby and by reason of the premises the person or persons so interested as aforesaid sustained an average damage or loss on the goods to a much larger amount than 3*l.* per cent. on all the money insured thereon, to wit, to the amount of 31*l.* 0*s.* 7*d.* by the hundred for each and every 100*l.* insured thereon by the plaintiffs ; whereby the defendant then became liable to

pay to the person or persons so interested as aforesaid a large sum of money, to wit, the sum of 31*l.* 0*s.* 7*d.* being his the defendant's proportion of the said average loss for and in respect of the said sum of 100*l.* so by him insured as aforesaid : and averred that the person or persons so interested as aforesaid did afterwards, by reason and in consequence of the said loss so occasioned as aforesaid by the said perils, losses and misfortunes so insured against, by their factors and servants, sue, labour and travel for, in and about the defence, safeguard and recovery of the goods, and in so doing did necessarily expend a large sum of money, whereby the defendant, according to the terms of the policy, then became liable to pay to the person or persons so interested as aforesaid a further sum of money, to wit, the sum of 6*l.*, being the rateable part or proportion of the expense aforesaid which the defendant ought to have paid in respect of the insurance aforesaid : concluding with the averment that all things had been done and happened &c. : and the plaintiffs claimed 50*l.*

Plea. Before and at the time of the making of the policy, and thence continually until and at the time of the losses, the person or persons so interested in the goods, and for whose use and benefit, and on whose account, the insurance was made were, and each of them was, *Spaniards*, and subjects of the Queen of *Spain*, and domiciled in the kingdom of *Spain*. And that, before the losses, or any of them, the ship, in the course of the voyage, arrived at *Corunna*, in the kingdom of *Spain*, and that, while at *Corunna*, an embargo was laid upon the ship by the Queen of *Spain*, and the ship was taken possession of by the Queen of *Spain*,

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and her agents duly authorized by her, for the purpose of conveying troops to *Malaga*, for the purpose of carrying on a war in which the Queen of *Spain* then was engaged with the Emperor of *Morocco*, and the captain and crew were compelled by the said Queen and her agents to remove the goods from the ship to make room for the troops, and the captain and crew were compelled by the Queen and her agents to remove the goods during stormy and tempestuous weather, and the goods were, by the Queen and her agents, placed on the open and uncovered quays at *Corunna*, the weather being then wet and rainy, and thereby the goods became and were damaged, injured, spoiled and deteriorated in value, &c. And that the goods were damaged, injured, spoiled and deteriorated solely by the premises in this plea mentioned, and not by any other perils, losses or misfortunes whatever; and that the suing, labouring and travelling mentioned were rendered necessary solely by the premises in this plea mentioned, and not otherwise.

Demurrer, and joinder in demurrer.

The case was heard by CROMPTON and BLACKBURN JJ. HILL J. was present during a portion of the time, but took no part.

Montague Smith, in support of the demurrer.

Honyman, contra.

The course which the case took in this Court, together with its having been afterwards fully argued by the same counsel in the Court of error, when the same authorities,

with some additional ones, were cited, renders it unnecessary to set out the arguments.

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THE COURT said that the question was, whether the cases of *Conway v. Gray* (a), *Conway v. Forbes* (b) and *Maury v. Shedden* (c), which were relied on by the defendant's counsel, should be upheld. Several authorities had been cited as overruling or being inconsistent with them, but the authorities on the subject were conflicting; and therefore, although they considered that the weight of authority was on the whole at variance with those cases, they would not overrule them, but leave their validity to be determined by a Court of error. Judgment must therefore be given for the plaintiffs.

Judgment for the plaintiffs.

(a) 10 *East*, 536.(b) *Id.* 539.(c) *Id.* 540.

IN THE EXCHEQUER CHAMBER.

1862.

AUBERT and another *against* GRAY.

Thursday,
November 6th.

For head note, see ante, p. 163.

ERROR having been brought on the judgment in this case, it was argued after *Easter* Term, 1862, on May 15th; before ERLE C. J., POLLOCK C. B., WILLIAMS and KEATING JJ., and BRAMWELL B. WILDE B. was also present at first, but left the Court after *Honyman's* first argument, and took no part in the judgment.

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Honyman, for the defendant.—Although this proceeding in error is, in form, brought to reverse the judgment of the Court of Queen's Bench, no opinion on the point in dispute was expressed by that Court; which, being pressed by the conflicting authorities cited, deemed it better to give judgment for the plaintiffs, in accordance with the decision in *Conway v. Gray* (a) and the cases reported with it, of *Conway v. Forbes* (b) and *Maury v. Shedden* (c), and let the question whether they were correctly decided, or have been overruled, be settled in a Court of error. In those cases Lord *Ellenborough*, and the Court of Queen's Bench, laid down as a principle that, in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; and, on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject, in a *British* Court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. If this is correct, the underwriter on a policy of insurance, containing the usual clause against "arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever," is not liable if the arrest, &c. is the act of the government of the assured, and the policy must be read with an implied exception to that effect. The introducing such an implied exception is in analogy with what has been done in other cases. A bond, for instance, for the assignment of all offices means all such offices as can lawfully be assigned.

(a) 10 *East*, 536.(b) *Id.* 539.(c) *Id.* 540.

The doctrine laid down in those cases is sound law, and has not been overruled.

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There is some difference of opinion as to whether a party may insure against his own act. In 3 *Kent. Comm.* 291, it is said: "A person may protect himself by insurance against all losses, except such as may be repugnant to public policy or positive prohibition, or occasioned by his own misconduct or fraud. Against the latter it is not to be presumed any insurance could be effected, nor would the Courts tolerate such a vicious principle; for this would, as *Pothier, Traité des Ass.*, No. 65, says, be a contract which would invite *ad delinquendum*." It is true that in *Bolland v. Disney* (a), where a life policy of insurance contained no exception of death by the hands of justice, it was held that such a death did not avoid the policy. But in *Smith's Mercantile Law*, p. 410, 6th ed., it is said: "As to the provisions inserted in policies by the insured on their own lives, respecting death by duelling or the sentence of the law, those are superfluous, for the policy would be unavailable to the representatives of the insured in case of such a death, even if they were not inserted; and if a man insuring his own life were to introduce a contrary provision, it would be void, as being against public policy"; and this is supported by *The Amicable Society v. Bolland* (b). [*Pollock C. B.* Put the case of a man whose life is insured being killed by going up in a balloon; or of a man, through intoxication, setting fire to a building which he has insured. *Wilde B.* In *Thompson v. Hopper* (c) it was decided by the Court of Queen's Bench that, where the loss was the consequence

(a) 3 *Russ.* 351.(b) 4 *Bligh N. R.* 194.(c) 6 *E. & B.* 172. 937.

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of wilful exposure of the ship to peril by sending her to sea in an unfit state, the plaintiff could not recover. *Erle C. J.* That judgment was reversed by the Exchequer Chamber (a).] Yes. But only because it did not appear that the unseaworthiness was the proximate and immediate cause of the loss. An insurance is properly a contract of wager, and a wager cannot be allowed where it is in the hands of either of the parties to win it or lose it if he pleases. On this principle a wager by an articulated clerk that he would not pass his examination has been held bad.

The bulk of the subsequent authorities are in accordance with *Conway v. Gray* (b) and the two cases by which it is accompanied. In *Usparicha v. Noble* (c), where an alien enemy domiciled here was licensed by order in council to ship goods from hence to certain ports in his own country, it was held that such commerce was legalized for all purposes, and such goods might therefore be insured by him, and he might recover on the policy, although the goods were taken by a co-belligerent of the enemy; but then his being domiciled here put him on the footing of a *British* subject. In *Mennett v. Bonham* (d) a license, under an order in council, to an alien enemy to export goods was held unavailable to recover a loss occasioned by the seizure and condemnation of the assured's own government. In *Flindt v. Crockatt* (e), *Same v. Scott* (f), affirmed on error (g), where a license to trade to an hostile port having been granted in favour of a foreigner, an insurance by him on the goods shipped was held valid; and

(a) *E. B. & E.* 1038.(c) 13 *East*, 332.(e) 15 *East*, 522.(b) 10 *East*, 536.(d) 15 *East*, 477.(f) *Id.* 525.(g) 5 *Taunt.* 674.

it was held no objection to his recovering that the loss was occasioned by the hostile act of his own state. In *Simeon v. Bazett* (a), affirmed on error, nom. *Bazett v. Meyer* (b), it was held that a neutral insuring an adventure, in furtherance of the objects of *British* commerce, was protected against confiscation by the act of his own government under the *Berlin* and *Milan* decrees. These cases indirectly recognise *Conway v. Gray* (c). [*Wilde B.* When the law has been laid down in a particular way, and followed for a great many years, it is a serious matter to make a change in it.] [He cited the judgment of *Wilde C. J.* in *Cockburn v. Alexander* (d).]

Campbell v. Innes (e) will be relied on by the other side, where a policy of insurance was effected by an *American* after a declaration of war by *America* against *England*, but before it was known in *England*, and the underwriter did not know that the assured was an *American* citizen; a loss having happened in consequence of a seizure by the *American* government, it was held that the action was not maintainable. There, however, the policy was not in the ordinary form, being made to cover all risks. [*Wilde B.* If the foreign government is at war with this country, that is another matter. *Williams J.* In *Campbell v. Innes* (e) it was assumed that the underwriter would be liable if he took on himself the risk. *Keating J.* In *Smith's Mercantile Law*, p. 361, 6th ed., another reason is given:—"Nor can a foreigner insure against the act of his own government, unless the underwriter agree to make such insurance with full knowledge of the country of the insured; for a *foreigner*, insured

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(a) 2 *Mau. & S.* 94.(c) 10 *East*, 536.(b) 5 *Taunt.* 824.(d) 6 *C. B.* 791.(e) 4 *B. & A.* 423.

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against a loss of that description, might give such information to his own government as would produce a seizure, the blow of which would fall upon the *British* underwriter."'] *Francis v. The Ocean Insurance Company* (a) will also be relied on by the plaintiff, but it does not appear that what was done there was the legislative act of the government of the assured.

Montague Smith (*Tomlinson* with him), *contra*.—The principle laid down in *Conway v. Gray* (b) is much too large. It may be applicable where two countries are at war, and consequently the subjects of each may be looked on as bound by the acts of their respective governments; or in a case like that of *Touteng v. Hubbard* (c), on which it professes to be founded, where the embargo was imposed by the *English* government by way of reprisals. The principle of *Conway v. Gray* (b) would extend to the case where, after an insurance had been effected in *England*, the *English* government imposed an embargo. But where the act of a man's government is done *in invitum*, he cannot be held constructively bound by it, so as to prevent his enforcing a contract with another party. The doing this would be to annex to the policy a condition which the parties have not expressed. In 1 *Park Ins.* 168, 8th ed., it is said, "An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. This term has

(a) 6 *Cowen*, 404; *aff.* on error, 2 *Wend.* 64.

(b) 10 *East*, 536.

(c) 3 *B. & P.* 291.

also a more extensive signification, for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprize." [Pollock C. B. I should like some better authority. Surely that would be a *casus belli*.] Park cites *Grotius de Jure Belli ac Pacis*, lib. 2, cap. 2, s. 10, and 1 *Blackst. Comm.* 270. But it is unnecessary for the present argument. [Pollock C. B. I should have thought a foreign government had no more right to impress ships than men.] In 1 *Park. Ins.* 171, 8th ed., "On evidence upon the trial in an action upon a policy of insurance, the case appeared to be, that the insurer agreed to insure the ship from her arrival at — in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ship by the government, who afterwards seized the ship, converted her into a fire ship, and offered to pay the owners. The question was, if this would excuse the insurers? *Holt* Chief Justice seemed to incline that it would not, and that this was within the words, *detention of princes*, &c., but he gave no absolute opinion, the cause having been referred to three of the jury. (Citing *Green v. Young*, 2 *Ld. Raym.* 840; 2 *Salk.* 444.) The very general words made use of in policies go to support the idea entertained by Lord *Holt*, and although till lately there was no case where this point was expressly considered, yet it seems to have been taken as settled in many

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1862. cases which have come before the Court. One instance
 AUBERT immediately occurs, in the case of *Robertson v. Ewer*,"
 v. (1 T. R. 127) "which was cited in a former chapter.
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 shipping at *Barbadoes*; and it does not appear to have
 been doubted or questioned at the bar, that the insurer
 was liable for any loss which might have been sustained
 by such detention, provided the loss had happened to
 any of the property specifically insured."

Conway v. Gray (a), though not perhaps expressly over-
 ruled, has been considerably shaken by subsequent cases
 and authorities. [Pollock C. B. I never heard that *Conway*
v. Gray (a) was overruled, and my brother *Wilde*, who has
 just left the Court, agrees with me. Since the peace of
 1815, much insurance law has necessarily been allowed
 to sleep.] It was very early attacked in *Flindt v.*
Crohatt (b) and *Same v. Scott* (c), affirmed on error (d).
Simeon v. Bazett (e), affirmed on error, nom. *Bazett v.*
Meyer (f), is at variance with it, and the language of
 Lord *Ellenborough* there shews that the principle laid
 down in *Conway v. Gray* (a) only applies to cases which
 fall within the reason of it, and is not to be applied
 under all circumstances. *Campbell v. Innes* (g) is still
 stronger against *Conway v. Gray* (a). The other side
 have sought to distinguish these cases on the ground that
 a license has the effect of converting the assured for the
 time into a *British* subject, but the only effect of such a
 license is to get rid of the illegality of dealing with the
 enemy. In *Flindt v. Scott* (h), *Same v. Crohatt*, in error (h),

(a) 10 *East*, 536.(c) 15 *East*, 525.(e) 2 *Mau. & S.* 94.(g) 4 *B. & Ald.* 423.(b) 15 *East*, 522.(d) 5 *Taunt.* 674.(f) 5 *Taunt.* 824.(h) 5 *Taunt.* 674. 692.

Mansfield C. J. says: "There is a wide difference between insuring against his own act and insuring against the act of his government." 2 *Arn. Ins.* 806, 2d ed., having stated the decision in *Flindt v. Crokatt, &c.* (a), says: "The general doctrine, however, of *Conway v. Gray*, though not directly touched by this decision, was subsequently shaken to its foundations, if not altogether overturned, by what fell from Lord *Ellenborough* himself, and still more from the Court of error, in giving judgment in the case of *Simeon v. Bazett*." And, at p. 808: "In the *United States*, the whole question has come before the consideration of the Supreme Court, and it has there been held, agreeably to the declared principle of decision acted upon by the *English Exchequer Chamber* in *Bazett v. Meyer*, that a subject is not to be deemed a party to the legislative acts of his own government, so as to deprive him of remedy on a policy effected by foreign underwriters in respect of losses caused by such acts"; for which he cites *Francis v. The Ocean Insurance Company*, 2 *Wend. Sup. C. Rep.* 64, cited *Kent's Comm.*, vol. 3, p. 292, ed. 1844.

The *American* authorities treat *Conway v. Gray* (b) as overruled. In *Phill. Ins.*, 3d ed., § 913: "*A citizen may be insured against an arrest or detention by his own government, not occasioned by his contravention of law.* A question was first raised on this proposition in a case where both contracting parties were subjects of the same government. A vessel insured was seized by government and converted into a fire-ship. Chief Justice *Holt* was inclined to the opinion that the insurers were liable, but the case being referred, the point was not decided." § 914. "*A foreign assured is indemnified, under a policy*

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in the common form, against the acts of his own government, that are not hostile to that of the underwriter. The contrary was held in a case where some *Americans*, being neutrals, shipped property for a voyage from the *United States* to *Liverpool*, which was insured in *England* on account of the shippers." (He then refers to *Conway v. Gray*, nom. *Conway v. Davidson*, *Same v. Forbes*, *Maury v. Shedden*.) "But in a later case, the opinion of the same Court, given by the same Judge, does not confirm this doctrine." (He then refers to *Simeon v. Bazett*.) "But it is not said that there was any difference between the policies, or any other circumstance to distinguish the cases; the latter decision, therefore, seems to overrule the former." 3 *Kent Comm.*, p. 292, is to the same effect. [*Pollock C. B.* This matter is treated in a book called "*Leading Cases*," which has been sent to me from *America*.] In *Francis v. The Ocean Insurance Company (a)*, *Sutherland J.*, in delivering the judgment of the Court, says, p. 423: "All the cases admit, that detention by an embargo, or other act of any other government than that of the assured, is one of the perils covered by the ordinary policy, and is good ground of abandonment. That an embargo by the government of the assured is as much within the actual contemplation of the parties, as an embargo by any other government, cannot be questioned; nor that the citizens of a country have no actual participation in the acts of the government, in any sense which would make it a violation of good faith to permit them to make those acts the foundation of a claim against a foreign underwriter. It strikes me as unworthy of the advanced intelligence of the age, and of the enlightened condition

(a) 6 *Cowen*, 404; affirm. on error, 2 *Wend.* 64.

of its jurisprudence, to suffer the symmetry of so important a department of the commercial law, to be broken in upon, on the strength of a notion so purely theoretical. This is the first time, I believe, in which this question has come before an *American* Court; and I have, for that reason, dwelt upon it longer than was necessary, for the purposes of the case which we are now deciding.” [Bramwell B. A man may be detained by the municipal law of a country where he happens to be. May not a ship be detained in the same way?] That is where a man has violated the municipal law of that country.

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Honyman, in reply.—The doctrine laid down in 1 *Park Ins.* 168, 8th ed., respecting the right of governments to impose embargos, cannot be supported. When embargos are imposed, whether on the property of natives or foreigners, compensation is always made.

No weight should be attached to *Arnould's* authority on the present subject, as he contradicts himself. Thus, in addition to the passage cited on the other side, he says, 1 *Arn. Ins.* 112, 2d ed.: “A *British* born subject, adopted by and trading in the *United States*, was permitted to prosecute a voyage from *America* to the *East Indies* in a manner which would have been illegal in a *British* subject, but was permitted by treaty to the citizens of the *United States*. * * * The same rule was afterwards applied to a natural born *British* subject, domiciled in the *United States*; and it was held that he might lawfully trade to a country at war with *England*, but at peace with the *United States*.” Again, in vol. 2, p. 808, speaking of *Campbell v. Innes* (a): “This case cer-

(a) 4 B. & A. 423.

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tainly seems to re-establish the principle acted upon by Lord *Ellenborough* in *Simeon v. Bazett*, viz., that an *English* underwriter is never liable for loss arising from the acts of the foreign government of the assured, unless the peculiar circumstances of the case, or form of the policy distinctly shew that he meant to insure such risk." [*M. Smith*.—The statement in the preceding page, that the question was not set at rest by the *English* law, qualifies that.] Again, p. 838: "But where, as we have already seen, the embargo is laid on by a foreign government, of which the assured is the subject, the law in *England* appears to be, that the foreign assured cannot abandon and recover as for a total loss, in respect of such embargo, in our Courts; at all events, unless it manifestly appears, either from the policy itself, or from the whole facts of the case, that such embargo was a risk distinctly contemplated by the parties to the policy."

In the passage cited from *Phillips on Insurance*, s. 914, it is stated that the form of the policy was the same in *Conway v. Gray* and in *Simeon v. Bazett*, which shews how carelessly this author had read the reports of those cases. And in several passages of the judgment in *Francis v. The Ocean Insurance Company* (a), pp. 417, 420, 424, the Court shew that they had no intention to overrule *Conway v. Gray* (b).

Cur. adv. vult.

The judgment of the Court was now delivered by

ERLE C. J. The plaintiffs, *Spaniards*, sued on a policy on goods by which they were insured, *inter alia*, against restraints of princes, in the usual form.

The ship was restrained at *Corunna* by order of the
(a) 6 *Coven*, 404; aff. on error, 2 *Wend*. 64. (b) 10 *East*, 536.

Spanish government, which had a temporary need for transports, and laid an embargo for that object on all vessels in some of its ports at that time, and so the loss was occasioned. The plaintiffs affirmed that the loss was caused by the restraint of a prince. And if the Court is to give effect to the intention of the parties, expressed by the words of the contract according to their ordinary meaning, they are right in this affirmation—the restraint of a prince caused the loss, the assured have used the words which express that they are to be indemnified against loss from any restraint of any prince; and in mercantile interest, the loss and the need for indemnity against it is the same, whoever be the prince who restrained the ship.

The defendant alleges that the ship was restrained by the act of the plaintiffs themselves, and he founds this allegation on the fiction that every subject of every state consents to and adopts as his own every act of the government of his state, according to the decision of *Conway v. Gray* (a). And he contended that a restraint by the *Spanish* government is a restraint by every *Spaniard*, and so by the plaintiffs.

The Court below gave judgment for the truth against that fiction, and in our opinion the Court below was right. Each party relied on the several authorities which he cited, but it is not now expedient to go through them with an attempt to reconcile them; they are in such apparent inconsistency that a Court of error has the duty of resorting to the governing principle, and deciding in accordance therewith.

The governing principle for the construction of contracts is to give effect to the intention of the parties expressed in the words of their contract; and, as before

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entitled to succeed.

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The assertion that the act of the government is the act of each subject of that government, is never really true. In representative governments it may have a partial semblance of truth, but in despotic governments it is without that semblance.

We were much pressed with the argument that the case of *Conway v. Gray* (a) has been constantly acted on by all parties interested in insurance law. The answer is, that the fact is disputed. The treatises lead to a contrary conclusion ; and, even if the assertion were true, still the plaintiffs ought to have our judgment, provided we think that the decision of the inferior Court, which would bind till it was overruled, was contrary to law : and that is our opinion.

This judgment recognises a marked distinction between an embargo in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility, either existing or expected, and an embargo connected with such hostility ; therefore this judgment does not interfere with any of the decisions on points connected with war.

It should also be understood that we do not say if the act of seizure was a lawful act under the municipal law of *Spain*, that, as against a *Spanish* subject, such seizure would be within the insurance.

The Lord Chief Baron authorizes me to say that, although he does not entirely concur with this judgment, he is not prepared to dissent from the decision of this Court and the Court below.

Judgment affirmed.

(a) 10 *East*, 536.

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WILLIAM ROBERTS, appellant, JOHN ROBERTS,
respondent.

*Saturday,
November 15th.*

*Highway rate.
Turnpike
road.
4 & 5 Vict.
c. 59. s. 1.*

In 1859 an Act was obtained for making a turnpike road from *L.* to *A.*, a distance of about sixteen miles, and empowering the trustees to take tolls on two portions of the road so soon as they were respectively completed and open to the public. In 1861, one of these portions, being a distance of about nine miles, was opened to the public, and tolls were taken on it. The other portion had not been commenced. Upon an information, under stat. 4 & 5 *Vict. c. 59. s. 1.*, alleging that the funds of the trust were insufficient for the repairs of the turnpike roads comprised therein, and that part of the road so opened was out of repair: held, that the justices had jurisdiction to order a portion of the highway rate to be applied to the repair of the road.

CASE stated by justices under stat. 20 & 21 *Vict. c. 43.*

An information preferred by *William Roberts*, the appellant, treasurer of the trustees of the *Llanrwst* and *Abergele* Turnpike Road Trust, against *John Roberts*, the respondent, surveyor of the highways of the township of *Sirior*, in the county of *Denbigh*, under stat. 4 & 5 *Vict. c. 59.* (which Act has been continued and is now in force), was heard and determined by justices at a special Session. It alleged that a certain road from *Abergele* to *Llanger-nieu* was made under the authority of stat. 22 & 23 *Vict. c. lxxviii.*, intituled "An Act for making a road from *Llanrwst* to *Abergele*, and a branch road thereout, in the counties of *Denbigh* and *Caernarvon*;" that the funds of the turnpike trust were insufficient for the repairs of the turnpike roads comprised therein, part whereof ran through and was situate within the township of *Sirior*, and that the part of the turnpike road so lying within the township was then out of repair; and further, that notice in writing of the intention of the appellant

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to exhibit the information had been, pursuant to the statute in that behalf, given by him as such treasurer to the respondent, that at the special Sessions application would be made to the justices for their examination into the state of the revenue and debts of the turnpike trust, as also to inquire into the state and condition of the repairs of the roads within the township, and also to ascertain the length of the roads, including turnpike roads, therein, and how much of the road was turnpike road, as required by stat. 4 & 5 *Vict. c. 59.*: and if, after such examination, it should appear to them necessary or expedient for the purpose of the turnpike road so to do, that then application would be made to them to adjudge and order that such portion as they might think necessary of the rate or assessment levied or to be levied by the Act in that behalf for and towards the repairs of such part of the turnpike road as was within the township.

In the year 1859, an Act, 22 & 23 *Vict. c. lxxviii.*, was obtained for making a turnpike road from the market town of *Llanrwst* to the market town of *Abergele*, a distance of sixteen miles and one furlong: the preamble of which recited, among other things, as follows: "Whereas the making and maintaining the road hereinafter described will be the means of opening a more direct communication than at present exists between the towns of *Llanrwst* and *Abergele*, in the county of *Denbigh*, and the making and maintaining the branch road leading out of such road will be of great service to the owners and occupiers of the adjoining lands, and such road and branch road, when opened to the public, will be a work of great public utility." Under the authority of that Act, a portion of the road, being the part lying between the village of *Llangerniew* and the market town of

Abergele, a distance of nine miles and one furlong, was, on the 17th *June*, 1861, opened to the public; and, in virtue of sect. 18 of that Act, tolls had been and still were taken at the toll bars erected on the part of the road so opened. The remaining part of the road from the village of *Llangerniew* to the market town of *Llanrwst*, a distance of seven miles, had not been commenced. Sect. 18 of the Act, which applies to the portion of the road so completed, enacts: "So soon as that portion of the road by this Act authorized as is situate between the town of *Llanrwst* and *The Stag Inn*, in the township of *Dyafon*, in the parish of *Llangerniew*, is completed and open to the public, the trustees may demand and take, at the several turnpikes which shall be erected upon or on the sides of the same, such tolls as the trustees may direct, not exceeding the tolls by this Act authorized to be taken; and so soon as that portion of the road before described as is situate between the said *Stag Inn* and the termination of the road in the said parish of *Abergele* is completed and open to the public, the trustees may in like manner demand and take, at the several turnpikes which shall be erected upon or on the sides of the same, such tolls as the trustees may direct, not exceeding the tolls by this Act authorized to be taken." The part of the road so opened is the portion referred to in the latter part of the above section, and runs through several townships within the division of *Indulas*, one of which is the township of which the respondent is surveyor. The funds of the trust were insufficient to keep the road in repair. The trustees had borrowed 6700*l.* on the security of the tolls of the trust, and the tolls received at the gates from the month of *June* to the 31st *December*, 1861, only amounted to 156*l.* 4*s.* 7*d.* There were 164 roods

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of the road so opened running through the respondent's parish; and it would cost 62*l.* to put and keep the same in effectual repair for the ensuing twelve months.

It was submitted by the appellant, that, under the 4 & 5 *Vict. c. 59.*, the justices had power to make an order on the respondent's township to contribute to the repair of that part of the road opened within his township, and that, the portion of the road from *Llan-gerniew* to *Abergele* having been completed and opened to the public, was to be treated in all respects, under sect. 18 of the *Llanrwst* and *Abergele* Act, as a distinct and separate road.

The respondent contended that the justices had no power to make an order, inasmuch as the road had not been completed from point to point, namely, from *Llanrwst* to *Abergele*, and until the whole road was opened the public could not be compelled to repair any part of it; and it was also urged that as, according to the preamble of the Act, the object of making the road was to have a direct line of communication between *Llanrwst* and *Abergele*, the two principal towns of the neighbourhood, which would be of great service to the owners and occupiers of the adjoining lands, the object could not be said to be attained, as the road had been opened little more than half way to *Llanrwst*, which provided no through communication, but was simply a communication between a rural village and a town, and in its present incomplete state was of little or no use to the owners and occupiers of the adjoining lands or the public in general; and it was further submitted that, until the whole road was opened, the traffic would not be developed, and it would not be ascertained whether or not the tolls would be equal to the expenditure; and further, that sect. 18 of the Act merely authorized the

taking of the tolls, and did not alter the general law that a turnpike road must be completed from point to point before statute duty could be applied for. The respondent also tendered evidence to shew that the part of the road so finished had never been properly made, and the appellant's application was in fact more for the purpose of obtaining funds to make and complete the road than to put it in repair; and moreover that there was no evidence before the justices that the road had been adopted by the township.

The justices came to the conclusion that, as the Act purported to be an Act for making a road from *Llanrwst* to *Abergele*, and not from *Llangerniew* to *Abergele*, being the part of the road so completed, they had no power to make an order on the respondent, as surveyor of the highways, for a contribution towards the repairs of the part of the road so opened, until the whole line of road from *Llanrwst* to *Abergele* was finished and opened to the public, and they accordingly dismissed the information.

The question for the opinion of the Court was, whether the justices were right in dismissing the information on the above ground.

Welsby, for the appellant.—In *Rex v. The Inhabitants of Cumberworth* (a) it was held that where trustees, empowered by Act of Parliament to make a road from *A.* to *B.*, being in length twelve miles, had completed eleven and a half miles of such road, to a point where it intersected a public highway, the district in which the part so completed lay was not bound to repair it, on the ground that the completion of the road for the entire

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(a) 3 B. & Ad. 108.

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distance was a condition precedent to creating a charge on the district; and *Rex v. The Inhabitants of Edge Lane* (a) followed the decision in that case. But here the road from *Llangerniew* to *Abergele* is a distinct turnpike road within the meaning of stat. 4 & 5 *Vict. c. 59. s. 1.* *Rex v. The Inhabitants of Cumberworth* (b) proceeded partly upon the notion, founded on *Rex v. The Inhabitants of St. Benedict* (c) and *Rex v. Mellor* (d), that there was a necessity for an adoption of the road by the parish; a notion which was, however, overruled in *Rex v. The Inhabitants of Leake* (e), confirmed by *Reg. v. The Inhabitants of Lordsmere* (f). Here the road in question was dedicated, not by a private person, but by a public body, and it was used by the public, and so became a public Queen's highway; whereupon all the incidents of a highway followed, one of which is that it is repairable by the parish, and therefore the case is within stat. 4 & 5 *Vict. c. 59.* [He cited *The Trustees of Sunk Island Turnpike Road*, appellants, *The Surveyors of The Highways of Patrington*, respondents (g).]

Watkin Williams, for the respondent.—The principle of the decision in *Rex v. The Inhabitants of Edge Lane* (a), which is not distinguishable from the present case, viz., that, where trustees are authorized to make a turnpike road, the entire road must be completed before the public can be compelled to repair any part, is still law. The road from *Llangerniew* to *Abergele* is not a turnpike road within the meaning of stat. 4 & 5 *Vict. c. 59. s. 1.*, which authorizes the justices to make a rate in aid of the

(a) 4 A. & E. 723.

(b) 3 B. & Ad. 108.

(c) 4 B. & A. 447.

(d) 1 B. & Ad. 32.

(e) 5 B. & Ad. 469.

(f) 15 Q. B. 689.

(g) 1 B. & S. 747.

tolls. [*Cockburn*, C. J.—So far as the road exists, it is not to be allowed to go out of repair. *Blackburn J.* I do not see any thing in the scheme of stat. 22 & 23 *Vict. c. lxxviii*, which shews that the making of the whole line of road from *Llanrwst* to *Abergele* is a condition precedent to any portion of it being repairable by the public. The language used by Lord *Eldon* in *Blakemore v. The Glamorganshire Canal Company (a)*, that local Acts for private undertakings are to be looked on as contracts with legislative sanction, has been explained in *The York and North Midland Railway Company v. The Queen (b)*.]

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COCKBURN C. J. Stat. 4 & 5 *Vict. c. 59. s. 1.* enacts that, where the funds of a turnpike trust are insufficient for the repairs of the turnpike roads within any parish, the justices may examine and inquire into certain matters, and, if it shall appear necessary or expedient, may order a portion of the highway rate to be laid out upon the repairs of the road. If this case had come before us after an examination and inquiry by the justices, we should not say what conclusion they ought to have come to. And they do not ask us whether they ought to have taken into consideration the circumstance that the road was not completed to *Llanrwst*, or whether, having taken that circumstance into consideration, they ought to have made an order under stat. 4 & 5 *Vict. c. 59.*; but whether, the whole of the road from *Llanrwst* to *Abergele* not having been completed, they had jurisdiction to make the order. The only question which we have to determine is whether the portion of the road which has been opened is a turnpike road within the township of *Sirior*, within the provisions of this statute. I think it

(a) 1 *Myl. & K.* 154. 162.(b) 1 *E. & B.* 858. 868, 869.

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is; the statute has made no provision for the non-exercise of the powers by the justices in the case of the entire length of a road not having been completed in pursuance of the Act for making it. The words being quite general, if we introduced an exception we should be legislating instead of construing the statute. Therefore the justices were wrong in dismissing the information on the ground stated.

BLACKBURN J. (The only other Judge present.) I am of the same opinion. Stat. 4 & 5 *Vict. c. 59.* gives the trustees of turnpike roads a right to apply to justices to make an order that the highway rate shall contribute to the repairs of that part of the road which is within the parish, when the funds of the turnpike trust are insufficient and the state of the repairs of the road renders it necessary and expedient. The respondent relies on the authority of *Rex v. The Inhabitants of Cumberworth (a)* and *Rex v. The Inhabitants of Edge Lane (b)*, and contends that the turnpike trustees had no power to make the road as far as *Llangerniew* only, stopping short of the whole length. But it is not necessary to consider whether, if *Rex v. The Inhabitants of Edge Lane (b)* was in point, it would bind us, because, granting that it is still law, stat. 22 & 23 *Vict. c. lxxviii. s. 18.* authorized the opening of the portion of the road between *Abergele* and *Llangerniew* before it was completed to *Llanrwst*; and it is clear that a portion of a turnpike road opened in compliance with an Act of Parliament is a turnpike road within stat. 4 & 5 *Vict. c. 59.*, unless there is a provision excepting it. There is no such provision; and therefore we cannot introduce one.

Case remitted.

(a) 1 *B. & Ad.* 108.

(b) 4 *A. & E.* 723.

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The QUEEN against GEORGE HUTCHINSON FISHER, *Monday,*
 Clerk, and RALPH DICKINSON GOUGH, Esq., *November 17th.*
 Justices of the County of STAFFORD.

Railways
Clauses Con-
solidation Act,
1845, 8 & 9
Vict. c. 20.
ss. 68, 69.
Accommoda-
tion works.
Mines.

By The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20. s. 68.*, the Company shall make and maintain "for the accommodation of the owners and occupiers of lands adjoining the railway," among other works, "All necessary arches, tunnels, culverts, drains &c., either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed." By sect. 69, "If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices &c." The owners of mines extending under a railway, which had been made by a railway Company under the powers of their Act, 3 *W. 4. c. xxxiv.*, which contained similar provisions with the 8 & 9 *Vict. c. 20.*, gave notice to the Company in 1858 of their intention to work the mine under the line of railway, and the Company declined or neglected to purchase. At this point the line of railway was in a deep cutting, and the Company had made drains upon the line for the purpose of carrying off the water which fell upon the railway, and ran from the sides of the cutting. The working of the mine had caused the land on which the railway was constructed to sink, so that the Company were compelled to fill up such sinkings in order to preserve the level of the railway, and thereby the drains had become in some places choked up, and the water percolated through the broken strata and through the cinders used by the Company for filling up the sinkings, and so passed into the mines. Held, that these drains were not accommodation works within sects. 68 and 69 of 8 & 9 *Vict. c. 20.*

IN *Michaelmas* Term, 1861,

H. S. Giffard obtained a rule calling upon *George Hutchinson Fisher*, Clerk, and *Ralph Dickinson Gough*, Esq., justices of the county of *Stafford*, to shew cause why a writ of certiorari should not issue to remove a certain order under their hands and seals, bearing date 24th *December*, 1860, ordering and adjudging that *The London and North Western Railway Company* should maintain and keep in repair the drains or culverts in the order mentioned, so as to convey the water as clearly

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from the colliery and lands of *James Bagnall* and *William Bagnall* as before the making of the railway, or as nearly so as might be.

The order, a copy of which was annexed to one of the affidavits in support of the rule, was made at a Petty Session of the justices of the peace of the county of *Stafford*, acting for the Petty Sessional Division of *Wolverhampton*, holden at *Willenhall*, on the 24th *December*, 1860. After reciting, among other things, an information and complaint that *The London and North Western Railway Company* had neglected to maintain and repair the drains or culverts, running from the flat bridge crossing the river *Tame* near the *Willenhall* railway station, along their line towards *The Crescent Colliery*, there occupied by *James Bagnall* and *William Bagnall*, carrying on business under the firm of "*Messrs. John Bagnall & Sons*," the colliery being lands lying near or affected by the railway, and the drains or culverts being in their then state insufficient to carry the water as clearly from the lands as before the making of the railway; and that a summons had issued thereon to *The London and North Western Railway Company* to appear to answer the complaint, it proceeded as follows: "We, the said justices, in pursuance of the powers conferred upon us by *The Railways Clauses Consolidation Act, 1845*, do find that a difference arose between the said *James Bagnall* and *William Bagnall* and *The London and North Western Railway Company* respecting the maintaining of the said drains or culverts mentioned in the said information and complaint, and that such drains or culverts are within the said *Wolverhampton* Petty Sessional Division, and that the said drains or culverts are not sufficient, at all times, to convey the water as clearly from the land lying near

or affected by the said railway as before the making of the same, or as nearly so as may be, and for insuring the speedy maintaining and repairing of the said drains and culverts we order and adjudge that the said *London and North Western Railway Company* do maintain and keep in repair the said drains or culverts, running from the flat bridge crossing the river *Tame* near the said *Willenhall* railway station, along the line of railway towards the said *Crescent Colliery*, there occupied by the said *James Bagnall* and *William Bagnall* (which said colliery are lands lying near or affected by the said railway), so as to convey the water as clearly from the said colliery and lands as before the making of the said railway, or as nearly so as may be. And we appoint ten days from the date of this present order for the commencement of such work. And we also appoint a calendar month from the date of this present order for the erection and completion of the same works. And we do hereby further order and adjudge the said *London and North Western Railway Company* to pay to the said *James Bagnall* and *William Bagnall* the sum of 2*l.* 15*s.*, forthwith, for their costs in this behalf. Given," &c.

The affidavits in support of the rule stated that the only witness called in support of the information and complaint was the mining agent of Messrs. *Bagnall*, who described generally the nature of the drains and the manner in which the mines were affected by the same having become stopped up, namely, amongst other things, by the percolation of the water through the broken strata, caused by the working of the mines beneath, and through the cinders used by the Company to fill up the sinking of the railway, also caused by the working of the mines; but no evidence was offered to shew that the drains were other

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than passages for carrying off water from the railway itself, and made by the Company for that purpose: that it was admitted that, if the drains were reopened, some water would still pass into the mines, unless the drains were made water tight by some process not adopted before the drains became stopped up; and that the workings of the mines were commenced fifteen years after the construction of the railway: that at the conclusion of the complainant's case it was objected for the Company that the drains were not accommodation works within the meaning of stat. 8 & 9 Vict. c. 20. s. 68., but were works made by the Company for their own accommodation; and further, that they were not accommodation works within the meaning of the Act, inasmuch as they were not required for fifteen years after the making of the railway; that mines underneath the railway were not adjoining lands within the meaning of the Act; and that the question raised by the summons and information was not within the jurisdiction of the justices.

The affidavit of the Company's superintendent of the permanent way of a certain district of the railway stated that the line of railway, at the point where Messrs. *Bagnall* were working their mines under the same, was in a cutting of the depth of about twenty-six feet, and the drains or culverts mentioned in the order, when open, were three feet in width and two feet in depth, and were situated on each side of and ran parallel with the line of railway, and were within a few feet of the actual rails of the railway, and were on land belonging to the Company, which had been purchased and used for the purpose of the construction of the railway; that it was the practice to construct similar drains or culverts by the side of the line of railway for the purpose of carrying off the water which falls upon the railway itself, and

which is collected upon and runs off from the banks or slopes of the cutting in which the line of railway is formed, and such drains or culverts were not constructed as works for the accommodation of the owners or occupiers of adjoining lands, but were strictly part of the works of the railway; that the working of the mine under the railway had caused the land on which the railway was constructed to sink from time to time, so that the Company had necessarily been compelled to fill up such sinkings in order to preserve the level of the railway and render the same safe for traffic, and by reason of such sinking, and the filling up of the space caused thereby, the drains or culverts had become in some places entirely choked up; that the filling up of such sinkings was a source of constant care and great expense to the Company, and they used for the same, in a great measure, cinders and refuse from collieries,—materials which, from the nature of the works carried on in the neighbourhood, were more readily obtained than other materials, and were effectual for the purpose for which the same were used,—but the water which was collected on the railway percolated through the same, and was thus conveyed into the mines; that the working of the mine had also caused considerable subsidence of the rock of which the sides or slopes of the railway were mainly composed, and made large cracks or fissures therein, to the great damage of the same, by means of which cracks or fissures the water falling on the sides or slopes found its way into the mines below; that the repair of the drains or culverts, and the putting them in the same condition as before the working of the mines, would not have the effect of entirely preventing the water which fell and was collected on the surface of

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the railway and works thereof from being conveyed into the mines, unless the drains were made completely water tight ; that, if the drains or culverts were once made water tight, the continued working of the mines would cause such sinking and disturbance of the bed of the drains or culverts that they would not be found effectual for preventing the water from sinking into the mines, and, even if it were possible to keep the drains or culverts completely water tight, some water would still percolate through the surface of the railway between the drains, and pass into the mines, by reason of the condition of the ground caused by the working of the mines.

The affidavit of the attorney for Messrs. *Bagnall* in opposition to the rule stated, that the railway and drains to which the information referred were constructed by *The Grand Junction Railway Company*, under the powers of their Act, 3 W. 4. c. xxxiv., which Act contained provisions similar to those in The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20., the mines being reserved to the owners, but they were required to give the Company twenty-one days notice of an intention to work them, and the Company had liberty to purchase them ; that by stat. 9 & 10 Vict. c. cciv., the *Grand Junction Railway* was vested in and declared to belong to *The London and North Western Railway Company* ; that in *July*, 1856, and in *October*, 1858, Messrs. *Bagnall* gave the Company notice in writing of their intention to work certain seams of coal and ironstone under and within forty yards of the railway, and the Company declined or neglected to treat for or purchase the said seams, or either of them, and Messrs. *Bagnall*, after the expiration of the time limited by law, worked and got the same pursuant to their notice.

The time of shewing cause against the rule was enlarged until judgment should be given in error in *Bagnall v. The London and North Western Railway Company* (a). The decision in the Court of Exchequer having been affirmed on error (b),

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Gray now shewed cause.—These drains are “accommodation works,” within The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20. s. 69.*, which enacts: “If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices; and such justices shall also appoint the time within which such works shall be commenced and executed by the Company.”

By sect. 68, “The Company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway;” and it mentions, among others, “all necessary arches, tunnels, culverts, drains, or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed.” And by the interpretation clause, sect. 3, “the word ‘lands’ shall include messuages, lands, tenements, and hereditaments of any tenure”; so that sect. 69 is to be read as if “mines or minerals” were mentioned in it. By sect. 73, “The Company shall not be compelled to make any further or additional

(a) 7 *H. & N.* 423.(b) 1 *H. & C.* 544.

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accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or, if no period be prescribed, after five years from the completion of the works and the opening of the railway for public use."

By stat. 3 W. 4. c. xxxiv., the Company were required to make, and from time to time maintain, among other things, such and so many culverts, ditches and passages over, under or by the side of, or leading to or from, the railway, of such dimensions, and in such manner, as two or more justices should, upon the application of the owner, lessee or tenant of any lands, mines, or minerals, judge necessary and appoint (in case there should be any dispute about the same) for the use of the owners and occupiers of the respective lands, mines and minerals through or over which such railways should be made, and for the commodious use and occupation of their lands, mines and minerals on either side of the railway. Mines or minerals are mentioned in the special Act, because it contained no interpretation clause.

Suppose the Company, without regard to an owner of the surface, made drains for the purpose of their railway, and those drains drained his land sufficiently, so that he had no occasion to go before justices in order to get drains made, it would be within the jurisdiction of justices to make an order, under sect. 69, for maintaining them. [*Wightman J.* The question is, whether these drains were, in the beginning, accommodation works?] If they were not, they have become accommodation works by reason of Messrs. *Bagnall* working their mines. Suppose a mine-owner is working mines not under but near the railway, and foresees that in a few months his working will be under the railway, it is necessary for the protection of the mine that the jus-

tices should have jurisdiction to order the Company to make drains to carry all the water which would otherwise get into the mine. It was decided, in *Bagnall v. The London and North Western Railway Company (a)*, that the Company were bound by their Act to keep the drains in repair.

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H. S. Giffard, in support of the rule.—The justices had no jurisdiction to make the order upon the evidence before them, nor upon the facts stated in the affidavits. The judgment in *Bagnall v. The London and North Western Railway Company (a)* was, that the Company were liable in an action for damages sustained by Messrs. *Bagnall* in consequence of their working of the mine having let down the surface, because, the Company having declined to purchase the mine, the mine-owner had a right to work it. If the justices had jurisdiction to make this order, there would be no occasion to resort to an action. These drains are not accommodation works within stat. 8 & 9 *Vict. c. 20. ss. 68, 69*. Sect. 68 does not contemplate accommodation works for mines; it refers to drains on the surface of the land. Messrs. *Bagnall* are not the owners of “lands adjoining the railway;” and these drains are in the railway, not “over or under or by the sides of the railway.” And the mischief would not be cured unless the justices ordered the Company to puddle the whole line of railway. [*Cockburn C. J.* The drains are sufficient to drain the surface; pro tanto, relief would be afforded if they were kept in order.]

COCKBURN C. J. This rule must be made absolute. The question whether works made by the Company are

(a) 7 *H. & N.* 423; affirmed in error, 1 *H. & C.* 544.

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works "for the accommodation of the owners and occupiers of lands adjoining the railway," within the meaning of stat. 8 & 9 *Vict. c. 20. s. 69.*, is one to be determined at the time of the construction of the works; and the owner should then make his election as to the step which he will take for obtaining the redress which the statute affords. If a mine-owner, not having made up his mind to work contiguous to or under the railway, applied to the Company to make accommodation works prospectively, the Company might answer that he would not suffer injury until he worked his mine, and that when he had determined to do so, they might choose to purchase the mine. I also think that sect. 68 has reference to what takes place upon the surface of the land, and not below the surface. It is a strong thing to say that, in respect of matters not on the surface and not apparent to the eye, the justices are to determine what accommodation works are necessary for the future. Here the mine-owners, Messrs. *Bagnall*, having given notice of their intention to work the mine, and the Company having declined or neglected to purchase, the case of *Bagnall v. The London and North Western Railway Company* (a) shews that the remedy for injury of this very nature caused by the railway is by action. I am of opinion that it could not have been intended that the proceedings to be taken under sect. 69 should apply to such a case as the present, or that the drains should be accommodation works within the provisions of sects. 68, 69.

WIGHTMAN and MELLOR JJ. concurred.

Rule absolute.

(a) 7 *H. & N.* 423; affirmed on error, 1 *H. & C.* 544.

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The QUEEN *against* Sir THOMAS MARYON WILSON, *Monday,*
 Lord of the Manor of HAMPSTEAD, and WIL- *November 17th.*
 LIAM LOADER, Steward of the same Manor.

Copyhold.
Devise.
Power to sell
and to convey.
Admittance.

A testator authorized, empowered and directed his executors to sell, either by public auction or private contract, his messuage &c., holden of the manor of *H.*, "and to convey and assure such copyhold hereditaments unto the purchaser or purchasers thereof." The executors sold the messuage by auction, and executed a deed of bargain and sale of it to the purchaser. Held, that the purchaser was entitled to be admitted as tenant without a previous admission by the executors or the heir.

IN this Term,

Hayes Serjt. obtained a rule calling upon Sir *Thomas Maryon Wilson*, lord of the manor of *Hampstead*, in the county of *Middlesex*, and *William Loader*, his steward of the said manor, to shew cause why a writ of mandamus should not issue directed to them, commanding them to admit *James Bradley Chamberlain* as tenant of a certain messuage in *High Street, Hampstead*.

John Dixon, deceased, by his will dated the 8th *October*, 1860, after giving a legacy to his daughter and directing the mode of payment, devised as follows:—
 "I hereby authorize, empower and direct my executor and executrix hereinafter named, as soon as conveniently may be after my decease, to sell and dispose of, either by public auction or private contract as to them shall seem meet, for the best price or prices in money that can be obtained for the same: All that my messuage or tenement situate and being in *High Street, Hampstead*, aforesaid, lying within and holden of the manor of *Hampstead*, and late in my occupation, with the yard, garden, right of way and passage and appurtenances thereunto belonging, and to which said premises I was admitted tenant at a court held in and for the said

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manor on or about the 8th day of *May*, 1826, and all other my copyhold messuages or tenements and hereditaments (if any) lying within and holden of the said manor, and to convey and assure such copyhold hereditaments unto the purchaser or purchasers thereof;” (then followed a clause declaring that the receipt of his executor and executrix for the purchase money should be a sufficient discharge to the purchaser, and that the purchaser should not be answerable for any loss or misapplication of the purchase money): “I give and bequeath all the monies to arise from the sale of my said copyhold hereditaments, together with the rents, issues and profits thereof in the meantime until such sale shall be made, and all the rest, residue and remainder of my effects, and the monies to arise from the conversion of my effects when sold, and all other my monies and effects whatsoever and wheresoever, subject to the payment of the legacy hereinbefore bequeathed, and of my just debts, funeral and testamentary expenses, including the costs of the sale of my said copyhold hereditaments, unto and equally between my son *James Dixon* and my daughters *Elizabeth Dixon*, *Emma Dixon*, *Maria Duff* (widow), and *Jane Dixon*, or such of them as may be living at the time of my decease, to be divided equally between them share and share alike, and I hereby nominate and appoint my said son *James Dixon* and my said daughter *Maria Duff* joint executor and executrix of this my will.”

The testator died on the 22d *December*, 1860, and his will was duly proved in the Court of Probate, on the 21st *January* following, by *James Dixon* and *Maria Duff*, the former of whom was also customary heir of the testator. On the 30th *October*, 1861, the messuage in question was put up for sale by auction, and *James*

Bradley Chamberlain became the purchaser for the sum of £1200. Neither the testator's heir nor his executors had been admitted as tenants of the said messuage on the court roll.

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By an indenture, made the 8th *February*, 1852, between *James Dixon* and *Maria Duff*, the executor and executrix, of the one part, and *James Bradley Chamberlain* of the other part, reciting that at a court held for the manor of *Hampstead*, on the 8th *May*, 1826, *Elizabeth Dixon*, the mother of *John Dixon*, together with *John Dixon*, was admitted to hold unto and to the use of *Elizabeth Dixon* and her assigns for life, and from her decease to the use and behoof of *John Dixon*, his heirs and assigns for ever, at the will of the lord according to the custom of the manor; and reciting the death of *Elizabeth Dixon* on the 16th *September*, 1826, and that *John Dixon* made his will, and the death of *John Dixon*, and that his executor and executrix, *James Dixon* and *Maria Duff*, had duly proved his will, and that *James Dixon* and *Maria Duff*, in pursuance and in exercise of the power given to them by the will, had sold and disposed by public auction of the copyhold hereditaments thereafter mentioned unto *James Bradley Chamberlain*, for an absolute and indefeasible estate of inheritance in possession according to the custom of the manor, &c.: It was witnessed that, in consideration of 1200*l.*, *James Dixon* and *Maria Duff*, in pursuance of the direction and authority contained in the will of *John Dixon* respecting the sale of his copyhold hereditaments, and all other powers and authorities enabling them in that behalf, bargained and sold unto *James Bradley Chamberlain*, his heirs and assigns, All that messuage, &c., and the reversion, &c., and all the estate, &c., to have and to hold the said

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hereditaments and premises unto and to the use of *James Bradley Chamberlain*, his heirs and assigns, for ever, at the will of the lord according to the custom of the manor, and by and under the rents, fines, suits, services and customs therefore due and of right accustomed, to the intent that *James Bradley Chamberlain*, his heirs or assigns, should, under or by virtue of the will of *John Dixon* and the bargain and sale or assurance thereinbefore contained, be forthwith admitted to the copyhold premises as absolute owner thereof according to the custom of the manor; &c.

At a court of the manor of *Hampstead*, held on the 2d June, 1862, *James Bradley Chamberlain* applied to the steward to admit him to the premises conveyed by the indenture of the 8th February, 1862; but the steward declined to do so, on the ground that the executors of *John Dixon* must be first admitted, in order to enable them to convey and assure to the purchaser.

C. E. Pollock shewed cause.—The applicant has not such an estate as entitles him to be admitted without a previous admission of the executors or the heir of the testator. By the will, either the executors have the legal estate by implication, they being made trustees to sell and a power to convey being given to them, or the estate goes to the heir until an appointment has been made by the executors; and the Court of Chancery would enjoin a surrender of the estate by the executors or the heir, as the case might be. If the will had given to the executors a power of sale only, the steward would have been bound to admit the purchaser without a previous admission of the executors; *Holder d. Sulyard v. Preston* (a), referred to in 1 *Scriven on Copyhold*, 4th ed.,

(a) 2 *Wils.* 400.

349: but here is a power to convey as well as a power of sale, and the executors have no power to convey until they have been admitted. This will varies from the usual form which is given in *Hayes and Jarman's Concise Forms of Wills*, 5th ed., 278:—"I will that my copyhold estate shall, so far as the tenure thereof will permit, be disposed of according to the trusts and declarations hereinbefore contained concerning my said residuary freehold estates; and, for the greater convenience of performing such my will, I devise the same copyhold estates to such uses as my trustees shall by any deed or deeds, to be executed within twenty-one years from my decease, appoint, in order to complete any sale or sales to be made pursuant to my will." And in a note it is said, "In the text, the copyholds are not included in the devise of the freeholds and leaseholds, in order that a common law power of sale and disposition may be vested in the trustees, by the exercise of which they may entitle a purchaser to admission without being themselves admitted." [*Blackburn J.* Why should this be treated as more than a power to sell? *Cockburn C. J.* The executors would have sufficient power for the present purpose if the clause directing them "to convey and assure" had been omitted, so that the maxim *Utile per inutile non vitiatur* applies. Also the clause may be construed as directing them to convey if it is necessary; here they can make over the estate without a conveyance, why then should they be called upon to multiply legal instruments unnecessarily?] A deed of bargain and sale conveying the premises from the executors to the applicant has been executed. [*Blackburn J.* But that deed only operates as an appointment. *Wightman J.* If the executors had not conveyed, the applicant is the right man to be admitted.]

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1862. *Hayes* Serjt. and *Thrupp* were not called upon to support the rule; but *Hayes* Serjt. applied for costs.
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 and Another. —This point was decided in *Beal v. Shepherd* (a).

PER CURIAM. (COCKBURN C. J., WIGHTMAN, BLACKBURN and MELLOR JJ.)

Rule absolute, with costs.

(a) *Cro. Jac.* 199.

Wednesday,
 November 19th.

CORNWELL, appellant, SANDERS, respondent.

*Trespass in
 search of game.
 Jurisdiction
 of justices.
 Title.
 1 & 2 W. 4.
 c. 32. s. 30.
 Appeal.
 20 & 21 Vict.
 c. 43.*

Upon an information under stat. 1 & 2 W. 4. c. 32. s. 30. for a trespass in search of game on land in the occupation of the lord of the manor, the defendant asserted that the land was not, as alleged by the informant, common or waste land within the manor, but was land vested in the inhabitant householders of certain parishes under an inclosure award, and claimed a prescriptive right to kill game on the land, but did not shew that he was an inhabitant householder of either of those parishes. The justices convicted the defendant; and in a case, stated under stat. 20 & 21 Vict. c. 43., set out the evidence upon which they decided that the land was waste or common of the manor, and found that the defendant had no ground for believing that he had the right of shooting over it. By stat. 1 & 2 W. 4. c. 32. s. 30. it is provided, "that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." Held,

1. That the jurisdiction of the justices was not ousted by the claim of a prescriptive right in gross to kill game on the land, there being no colour for such a claim:

2. Nor by the assertion that the land was not in the occupation of the lord of the manor, but was vested in other persons, as the claim of title to oust the jurisdiction of the justices must be a claim of title in the party charged, and not in a third person:

3. Held by Cockburn C. J., Blackburn and Mellor JJ., that, there being evidence before the justices of the land being in the occupation of the lord of the manor, this Court ought not to review their decision. But, by Wightman J., that, the evidence being set out, this Court might review their decision and reverse it, if it appeared that they had come to a wrong conclusion.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions, held at *Bottisham*, in the county of *Cambridge*, the appellant appeared to answer an infor-

mation charging that he unlawfully committed a trespass by being, in the day time, upon a certain piece of land in the occupation of *Clement Francis*, Esq., lord of the manor of *Stow-cum-Quy*, in search of game there, without the license or consent of the lord of the manor, or of any person having the right of killing game upon such land, or of any other person having any right to authorize him to enter or be upon the said land for the purpose aforesaid, contrary to stat. 1 & 2 W. 4. c. 32. s. 30.

The case set out the evidence given before the justices in support of the information, from which it appeared, among other things, that *Clement Francis* was lord of the manor of *Stow-cum-Quy*; that, by reputation, the bounds of the manor and the parish of *Stow-cum-Quy* were conterminous and co-extensive; and parol evidence was given that the place where the appellant was alleged to be trespassing in search of game, which was a part of the parish called *Quy Fen*, was within the manor of *Stow-cum-Quy*. *Quy Fen* is not commonable for cattle, but only for digging turf and cutting stover; and every householder in the parishes of *Stow-cum-Quy*, *Fen Ditton* and *Horningsea* has a right of digging turf and cutting stover in *Quy Fen*. It was not shewn that the appellant was the occupier of a house in either of those parishes. An inclosure award, made by Commissioners under an Act of Parliament passed for inclosing the parish of *Stow-cum-Quy*, and dated the 3d November, 1840, with a plan of the parish thereto annexed, was put in evidence on behalf of the respondent. In that plan the piece of land mentioned in the information was marked No. 56, and in the schedule to the award it was described as follows:—

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1862.	Proprietors.	Number on plan.	Description.	Culture.	Quantity.
CORNWELL v. SANDERS.	<i>Quy Fen, Ditton and Horningsea Parishes.</i>	56	<i>Common Fen.</i>	Pasture.	68 0 35

On behalf of the appellant three points were submitted :

First. That, assuming *Clement Francis* to be the lord of the manor of *Stow-cum-Quy*, and the land numbered 56 on the plan to be within the bounds of the manor, there was no evidence to shew that such land was a waste or common within the 1 & 2 *W. 4. c. 32. ss. 10 & 30*, such land being vested in the inhabitant householders of the several parishes of *Stow-cum-Quy*, *Fen Ditton* and *Horningsea*, and not in *Clement Francis*, as lord of the manor, and that, according to *The Grand Union Canal Company v. Ashby (a)*, the right of soil not being in the lord of the manor, the Act of Parliament did not give him the game, or make him legal occupier.

Secondly. That the appellant had a prescriptive right of sporting over the land numbered 56.

Thirdly. That the justices had no jurisdiction, there being a *bonâ fide* question of title at issue.

In support of the first point, the appellant relied upon the award, the schedule to which described the land in question as an old inclosure, and the proprietors as being the three parishes named : and evidence was given that the appellant had shot in *Quy Fen* for about forty years with the witnesses who were called ; but before the inclosure snipes only were found there.

The justices determined that *Clement Francis* was lord of the manor of *Stow-cum-Quy* ; that the land numbered 56 on the plan, and in the evidence called *Quy*

(a) 6 *H. & N.* 394.

Fen and Common Fen, was a waste or common within such manor, and that such land was not vested in the inhabitant householders of the several parishes of *Stow-cum-Quy*, *Fen Ditton* and *Horningsea*, but that the lord of the manor was the legal occupier thereof within the meaning of the 1 & 2 *W. 4. c. 32. s. 30.*; that the appellant had not proved that he had a prescriptive or any other right of sporting over the land numbered 56, and that the appellant had not any ground for believing that he had any such right; and they found that the appellant was guilty of the offence charged in the information.

The case concluded with stating that the justices, in accordance with the application of the appellant, had set forth their determination, and the facts and grounds thereof.

Welsby, for the respondent, was not present when the case was called on.

O'Malley (*Phear* with him), for the appellant.—The justices had not jurisdiction to convict the appellant, as a *bonâ fide* claim of title was made before them. By sect. 10 of stat. 1 & 2 *W. 4. c. 32.*, the lord of the manor has the right of killing game upon the wastes or commons within the manor; and, by the proviso to sect. 30, he is to be deemed to be the legal occupier of the land of such wastes or commons. The land in question was described in the information as in the occupation of *C. Francis*, the lord of the manor; and he attempted to shew before the justices that it was part of the wastes or commons of the manor, and that therefore he had the right of killing the game on it. That was

1862. disputed by the appellant on the ground that sect. 10,
 CORNWELL according to the decision in *The Grand Union Canal*
 v. *Company v. Ashby (a)*, conferred the right of killing
 SANDERS. game on the lord of the manor in the lord's wastes only,
 and not in common fields over which other persons had
 rights in severalty. [*Cockburn C. J.* The proviso in
 sect. 30 says that the lord of the manor shall be deemed
 to be the legal occupier of the wastes or commons
 "within such manor," not "of such manor."] The
 justices find that the appellant had no ground for be-
 lieving that he had any right of shooting over the land
 in question; but they do not find that his claim was
 not made bonâ fide. In *Reg. v. Cridland (b)* there
 was a strong intimation of opinion by all the Judges
 that, if a claim of title was bonâ fide set up, the justices
 would have no jurisdiction to proceed farther. The
 appellant set up two defences to the information; first,
 that the land in question was land belonging to certain
 parishes, which negatived the right of the lord of the
 manor; and, secondly, that he, the appellant, had a pre-
 scriptive right of shooting over it.

The Court then called upon

Welsby, for the respondent.—As to the claim of the
 appellant to shoot over the land in question, he was not
 a parishioner of either of the parishes named in the
 schedule, and he gave no evidence of a prescriptive right.
 Whether the land in question was in the occupation of
 the lord of the manor was an issue raised and discussed
 before the justices, and one which they were bound to
 decide; *Williams v. Adams (c)*. [*Cockburn C. J.* When a
 right to prosecute, given by statute, depends upon the title

(a) 6 H. & N. 394.

(b) 7 E. & B. 853.

(c) 2 B. & S. 312.

of the person prosecuting, and the party prosecuted denies the title, has he not a right to say that is a question of title as much as when he sets up title in himself?] Any person may lay an information under stat. 1 & 2 W. 4. c. 32.; *Middleton v. Gale* (a). It is not material whether the appellant believed that he had a right to shoot over the land in question, as the justices have found that he had no ground for so believing; *Morden*, appt., *Porter*, respnt. (b), per *Williams* and *Willes* JJ. And in *Leatt v. Vine* (c), *Wightman* J., in the Bail Court, inclining to the opinion expressed by those Judges in that case, held that the setting up a general right in the party charged, and any one, to shoot over the land, without shewing or professing to shew such a claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the justices.

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O'Malley, in reply.—First. If the appellant bonâ fide believed that he had a right to shoot over the land in question, he cannot be convicted of a trespass. [*Cockburn* C. J. The intention of the appellant was to deny that the land in question was part of the wastes of the manor, and to assert that therefore the parishioners of the parishes named had a right to sport over it; and, if that question had been raised by a parishioner of one of those parishes, the justices ought to have left it to be decided by another tribunal. But, when the claim became an idle one, they were right in disregarding it.] The jurisdiction of the justices is ousted when a question of title arises, whether it be title in the informant or in the party charged. [*Cockburn* C. J. The appellant attempted to disprove

(a) 8 A. & E. 155.

(b) 7 C. B. N. S. 641.

(c) 30 L. J. M. C. 207.

1862. the allegation in the information that the land in question was in the occupation of the lord of the manor ; he did not claim title in himself.]

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Secondly. It must be conceded that the prescriptive right set up by the appellant cannot be supported. But in *Paley on Convictions*, p. 118, 4th ed., it is said : " From these [decisions] it will be seen, that, without entering into the substantial merits of the title set up, it is sufficient to stop the summary interference of a magistrate by conviction, that even a colour of title appears to be in question, and that the act was really done under an assertion of that supposed title, however weak the claim may be."

COCKBURN C. J. The rule that, upon summary proceedings before justices, their jurisdiction is ousted by a claim of right, applies only to a claim of right set up by the party against whom the proceeding is instituted. But when the party charged asserts title in himself, though the title be only colourable, yet if the assertion be made *bonâ fide* the jurisdiction of the justices falls to the ground. There must, however, be some colour or show of reason for the claim. In the present case there was no reasonable foundation for it, and therefore the jurisdiction of the justices was not taken away.

As to the important question, whether the justices ought to have convicted the appellant on the evidence as to the land being waste of the manor, there was some evidence upon which they might act, and we cannot review their decision.

WIGHTMAN J. I agree with the Lord Chief Justice with respect to the claim of right set up by the appellant to shoot over the land in question, and can only repeat

what I said in *Leatt v. Vine* (a), that it may be that the appellant thought that he had a right, because he and other persons had shot over the land in question. But the mere belief that he had such a right is not a bonâ fide claim of right which would warrant any person in appealing from the decision of the justices, as it would under the Malicious Trespass Act, 7 & 8 G. 4. c. 30. The appellant did not set up any right known to the law to shoot over the land in question.

But I doubt whether the justices were not wrong in convicting the appellant, because the proviso in stat. 1 & 2 W. 4. c. 32. s. 30. says that the party charged "shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." Here the alleged trespass was upon land in the occupation of the lord of the manor of *Stow-cum-Quy*, and it seems to me that there is such a weight of evidence that the land in question was not in the occupation of the lord of the manor, as alleged in the information, that the justices ought not to have found as they did. The award under the Enclosure Act was put in evidence before them, and it appears that the land is described in the Schedule as an old enclosure, and the proprietors are stated to be "*Quy Fen, Ditton and Horningsea* parishes." The award is by the Enclosure Act made evidence of the matters contained in it. Against this evidence, which seems to me conclusive, it is said that there was some parol evidence; but that evidence only goes to this extent, that the fen itself generally was waste of the manor; and although the witnesses for the respondent, in speaking of the fen generally, made no exception of the old inclosure, the land in question, though it may originally have been part of

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(a) 30 L. J. M. C. 207.

1862. the fen, is distinct from that which is fen, popularly so called.

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It is said that this was a matter for the justices to inquire into and decide, and that their decision is conclusive. As a general rule that is true; but as they have set out the evidence, which seems to me to be all one way, shewing that the land in question was enclosed land belonging to the parish, and they have in effect asked our opinion whether upon the matters stated they were right in deciding as they did, it appears to me that they ought not to have found, upon the evidence before them, that the land in question was in the occupation of the lord of the manor, and therefore ought not to have convicted the appellant.

BLACKBURN J. I am of opinion, with my Lord Chief Justice, that our judgment ought to be in favour of this conviction.

Two points have been made for the appellant, and it is necessary to distinguish how they arise.

The first arises thus: the appellant, being informed against for committing a trespass in pursuit of game, set up a prescriptive right in gross to kill game on the land, because he had formerly shot there. Mr. *O'Malley*, admitting that there was no colour for the existence of such a right, contended notwithstanding that the justices ought not to have convicted if the appellant honestly thought that he had a right, though in truth he had not. But as long ago as *Calcraft v. Gibbs* (a), which, being an action for penalties under the game laws, is analogous to an information, it was determined that it was no defence to the action, that the defendant

(a) 5 T. R. 19.

acted bonâ fide as gamekeeper under a deputation from a person, who claimed a right to appoint him but without any right or colour of title; and a similar decision was come to by my brother *Wightman* in the Bail Court in *Leatt v. Vine* (a), in which he now agrees.

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The circumstances under which the second point arises are that the appellant contended that it was necessary to prove, as was alleged in the information, that the trespass was on land in the occupation of the lord of the manor; the appellant traversed that fact, and said that he could prove that the land was not part of the commons and wastes within the manor, but private lands belonging to the parishioners of certain parishes; and that, this being a denial of the title of the lord of the manor, the justices were bound to hold their hands. The first question upon this part of the case is whether, where there is a plausible denial of title in the informant, the case is within the rule laid down in *Reg. v. Cridland* (b), that, on summary proceedings before justices, they cannot determine questions of title; a rule not founded upon the existence of any clause in the Act of Parliament under which the proceeding is taken, as in the proceedings to enforce payment of church rates and other similar cases, but on a general principle of law.

In *Reg. v. Cridland* (b), where the justices convicted under this statute, this Court intimated a strong opinion that, where there is a claim of title in the defendant or in the person under whom he claims, the justices should stay their hands; but the language of the Judges seems carefully chosen to exclude a claim of title in another person. Lord *Campbell* said, p. 867, when a bonâ fide claim of title is set up, "it seems to me the

(a) 30 *L. J. M. C.* 207.

(b) 7 *E. & B.* 853.

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justices have no longer jurisdiction to proceed to a summary conviction." *Coleridge J.*, p. 868, "The jurisdiction of justices to convict summarily ceases as soon as a claim of title is bonâ fide made. If not, magistrates might, against the will of a defendant, determine upon his title to a large property." *Erle J.* "I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained an honest belief that he had a title; and, if he had such belief, he ought not to be convicted." And the language of *Crompton J.* is precisely the same. The reason of the rule is plain when the defendant or those with him set up a claim of right in himself or in them; but when the defendant sets up no title in himself, but a *jus tertii*, that is not a claim of title within the reason of the rule. I do not understand that my brother *Wightman* entertains a different opinion from the rest of the Court on this point.

But there is a further question. Inasmuch as, by the proviso to sect. 30, the defendant may prove by way of defence any matter which would have been a defence to an action for such trespass, the appellant here objected that there was a variance between the statement of title in the information and the evidence, and proposed to shew that he had not trespassed on the land of the lord of the manor. My brother *Wightman* thinks that there was no evidence on which the justices could convict. I have great doubts whether it is competent for us to look into this question, the justices not having referred it to us, and I doubt whether they could do so; but it is enough to say that there is evidence which, if I had been trying the question at nisi prius, I could not have withdrawn from the jury. On this point only, as I understand, is there a difference of opinion on the Bench.

MELLOR J. I am of the same opinion as my Lord Chief Justice and my brother *Blackburn* on both points.

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When Mr. *O'Malley* admitted that it was impossible for a prescription in gross to kill game to exist in law, it is clear that the justices were right in disregarding that claim.

As to the other point, occupation of the land as laid in the information must be proved, and the justices must of necessity inquire into it. Here, as by the proviso to sect. 30 the lord of the manor shall be deemed to be the legal occupier of the land of the wastes or commons within the manor, if there was any evidence of this land being part of the wastes or commons within the manor, it was for them to determine the effect of it; and we are not to say on which side the evidence preponderated. And I think that it would not be right in them to ask us that question.

Conviction affirmed.

FESTING *against* TAYLOR and the Dowager
Duchess of SOMERSET.

[Tuesday,
January 14th.]

The Duke of *S.* devised certain farms and hereditaments to trustees to secure a yearly rent charge to his wife, the Duchess of *S.*, for life, to be paid by two half yearly payments in every year, "without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rent charge, or on the said Duchess or her assigns in respect thereof, by authority of Parliament or otherwise howsoever." Payment of this rent charge was secured by powers of distress and entry reserved to the Duchess, and by a term of years created in the trustees: Held that the Duchess was entitled to have the rent charge paid to her in full, and free from deduction in respect of income tax imposed under the 5 & 6 *Vict. c. 35.* or subsequent Acts. Per the Exch. Chamber, consisting of *Erle C. J.*, *Pollock C. B.*, *Williams, Willes* and *Byles JJ.*, and *Martin* and *Channell BB.*: reversing the decision of the Queen's Bench, consisting of *Wightman* and *Blackburn JJ.*

Income tax.
5 & 6 *Vict.*
c. 35.
Rent charge.
Devise.

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THE following case was stated for the opinion of the Court, without pleadings, under the Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76. s. 46.*

The plaintiff is tenant and occupier of certain of the lands and tenements upon which the rent charge hereinafter mentioned is charged, and over which the power of distress hereinafter mentioned extends. The defendants are the Dowager Duchess of the late Duke of *Somerset*, and donee under his will of the said rent charge, and the bailiff duly authorized by her to distrain for the same.

On the 8th *April*, 1854, the late Duke of *Somerset* duly made his will, whereby he gave and devised to his friends the Right Honourable *Thomas*, Earl of *Zetland*, and Sir *Michael Shaw Stewart*, of *Ardgowan*, in *Scotland*, Baronet, and their heirs, all those his several messuages, farms, lands and hereditaments situate or arising in the county of *Wilts*, and therein-after specifically described, with the rights, members and appurtenances thereunto belonging, that was to say, as to and concerning certain farms, farm buildings and lands in the said will particularly described, including the lands and tenements of which the plaintiff is tenant and occupier as aforesaid, to the use and intent that his wife *Margaret*, Duchess of *Somerset*, the defendant in this action, in case she should survive him, and her assigns, might, from and after his decease, yearly, have and receive during her natural life one yearly rent charge of 2200*l.* of lawful money of *Great Britain*, to be charged upon and issuing out of all and singular the farms, hereditaments and premises thereinbefore lastly mentioned, which include the lands and tenements of which the plaintiff is occupier as aforesaid, and to be paid to the said *Margaret*, Duchess of *Somerset*, or her

assigns, by two equal half yearly payments in every year, without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rent charge of 2200*l.*, or on the said *Margaret*, Duchess of *Somerset*, or her assigns, in respect thereof, by authority of Parliament or otherwise howsoever; and the first half yearly payment of the same yearly rent charge to be made at the expiration of six calendar months after his decease. And to this further use and intent that, if the said yearly rent charge of 2200*l.*, or any part thereof, should at any time be in arrear and unpaid by the space of thirty days next after any of the days on which the same ought to be paid as aforesaid, then and so often it should be lawful (although no legal demand should have been made thereof) for the said *Margaret*, Duchess of *Somerset*, or her assigns, to enter and distrain upon all or any part of the said hereditaments and premises thereby charged therewith, and to dispose of the distress and distresses then and there taken according to law, in like manner as in the case of distresses taken for rent reserved on a common demise for years; to the intent that the said *Margaret*, Duchess of *Somerset*, might be fully paid and satisfied the said yearly rent charge of 2200*l.*, or any part thereof, so in arrear and unpaid, and all costs and expenses occasioned by the nonpayment thereof. And to the further use and intent that, in case the said annual sum of 2200*l.*, or any half yearly payment thereof, should at any time or times thereafter be in arrear and unpaid by the space of forty days next after any of the days whereon the same ought to be paid as aforesaid, then and so often it should be lawful (although no legal demand should have been

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made thereof) for the said *Margaret*, Duchess of *Somerset*, or her assigns, to enter upon and hold the said hereditaments charged therewith, or any part thereof, and to receive and take the rents, issues and profits thereof for her and their own use, until she or they should be thereby or otherwise fully paid and satisfied the arrears of the same rent charge due at the time of such entry, and which should afterwards accrue during her or their being in possession of the same premises; together with all such costs and expenses whatsoever as she or they should sustain by reason of the nonpayment thereof; and such possession to be without impeachment of waste. And subject and without prejudice to the said yearly rent charge of 2200*l.*, and the powers and remedies in the said will before limited for the recovery thereof: to the use of the said Earl of *Zetland* and *James Currie*, their executors and administrators and assigns, for a term of 600 years from the said testator's decease, upon certain trusts in the said will declared concerning the same, that was to say, upon trust that if the said *Margaret*, Duchess of *Somerset*, should survive the said testator, and the said yearly rent charge of 2200*l.* or any part thereof should at any time be in arrear and unpaid by the space of sixty days next after any of the days whereon the same ought to be paid as aforesaid, then and so often the said *Thomas*, Earl of *Zetland*, and *James Currie*, and the survivor of them, his executors, administrators, or their or his assigns, should, from time to time, by and out of the rents, issues and profits of the said hereditaments and premises comprised in the said term of 600 years, or by mortgage, sale, or demise thereof, or of any part thereof, for all or any part of the said term, or by recovering and receiving the rents, issues and profits thereof from the tenants and occupiers,

or by all or any of the ways aforesaid, or by any other reasonable ways or means, levy, raise and pay the said yearly rent charge of 2200*l.*, and all arrears thereof then due or which should afterwards, during their continuance in possession, accrue of the same; and all costs, damages and expenses which the said *Margaret*, Duchess of *Somerset*, her executors, administrators or assigns, or the said *Thomas*, Earl of *Zetland*, and *James Currie*, or either of them, their or either of their executors, administrators or assigns, should sustain by reason of the nonpayment thereof.

The testator died on the 14th *August*, 1855.

Since the death of the testator, the annuity of 2200*l.* has been paid by the present Duke of *Somerset*, who is in receipt of the rents and profits of the farms and lands upon which it is charged, on the assumption that he is entitled, before payment, to deduct the income tax. The annuity has therefore been paid short of the sums from time to time due upon an annuity of this amount in respect of income tax. The Duchess Dowager of *Somerset*, on the other hand, has contended that the intention of the testator was that she should receive the annual sum of 2200*l.* without any deduction whatsoever; and she has received the payments made in respect of the annuity without prejudice to her right to receive the 2200*l.* in full. If the contention of the Duke be right, it is admitted that the annuity has been duly paid, and that nothing is due in respect thereof. If the contention of the defendants be right, it is admitted that the sum of 504*l.* 3*s.* 4*d.* due in respect of the said annuity was, on the 15th *February*, 1861, in arrear and unpaid, and that the power of distress above recited might legally have been enforced in respect of such arrears.

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The question for the opinion of the Court is, whether the defendant, *Margaret*, Dowager Duchess of *Somerset*, is entitled to have the annuity and the half yearly instalments thereof paid to her in full, and free from the deduction in respect of income tax.

If the judgment of the Court should be given in the affirmative, it is agreed that the said sum of 504*l.* 3*s.* 4*d.* arrears shall be paid by the plaintiff to the last named defendant, together with the costs of this action; and if the judgment of the Court should be in the negative, then the costs of this action shall be paid by the last named defendant to the plaintiff.

The question turned on the following sections of the Property and Income Tax Acts, 5 & 6 *Vict. c.* 35. and 16 & 17 *Vict. c.* 34.

5 & 6 *Vict. c.* 35. *s.* 1. From and after the 5th *April*, 1842, "there shall be charged, raised, levied, collected, and paid, &c., during the term hereinafter limited, the several rates and duties mentioned in the several Schedules contained in this Act."

Sect. 60. The duties granted in Schedule (A.) "shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, &c."

Schedule (A.), No. IV., Rule 9. "The occupier of any lands, tenements, hereditaments, or heritages being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the Commissioners being first deducted) as a rate of 7*d.* for every 20*s.* thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made

on account of rent; and the receivers of Her Majesty, and all landlords, both mediate and immediate, their respective heirs, executors, administrators, and assigns, according to their respective interests, and their respective receivers or agents, shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable; and the occupier of lands charged on the amount of any composition, rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition, rent, or payment, on paying the same."

Rule 10. "Where any such lands, tenements, or hereditaments are subject or liable to the payment of any rent charge, whether under the Act passed for the commutation of tithes, or otherwise, or any annuity, fee farm rent, rent service, quit rent, feu duty, teind duty, stipends to licensed curates, or other rent or annual payment thereupon reserved or charged, the landlord, owner, or proprietor by whom any deduction shall have been allowed as aforesaid, and the owner or proprietor being also occupier and charged to the said duties, shall deduct and retain out of every such rent charge, &c., so much of the said duties or payments on account of the same, (the just proportion of the sums allowed by the Commissioners in the cases authorized by this Act being first deducted,) as a like rate of 7*d.* for every 20*s.*, on every such rent charge, &c., respectively, shall by a just proportion amount unto; and the receivers of Her Majesty, and all persons who shall be anyways entitled unto such rents, duties, stipends, or annual payments,

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their receivers, deputies, or agents, are hereby required to allow such deduction, upon the receipt of the residue of such monies as shall be due and payable for such rents, duties, or annual payments, without any fee or charge for such allowance, and under the penalty herein contained; and the landlord, owner, proprietor and occupier respectively, being charged as aforesaid, or having allowed such deduction, shall be acquitted and discharged of so much money as if the same had actually been paid unto such person to whom such rent charge &c., shall have been due and payable."

Sect. 73. "Provided always, and be it enacted, that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements."

Sect. 103. "If any person shall refuse to allow any deduction authorized to be made by this Act out of any payment of annual interest of money lent, or other debt bearing annual interest, whether the same be secured by mortgage or otherwise, he shall forfeit for every such offence treble the value of such principal money or debt; and if any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. IV. Schedule (A), or out of any annuity or

annual payment mentioned in Schedules (C.) or (E.), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of 50*l*.; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

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Sect. 5. "The said duties hereby granted shall be assessed, raised, levied, and collected" under the regulations and provisions of 5 & 6 *Vict. c. 35.*, "and of the several Acts therein mentioned or referred to, and also of any Act or Acts subsequently passed explaining, altering, amending, or continuing" that Act; &c.

Sect. 40. "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act, that is to say, &c.; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had been actually paid unto the person to whom such payment shall have become due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money,

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upon pain of forfeiting the sum of 50*l.* for any refusal so to do : Provided always, that no tenant or occupier of any property chargeable under Schedule (A.) of this Act shall be entitled to deduct or retain out of the rent thereof any greater sum than the amount of the duty which shall have been assessed and charged upon or in respect of such property, and actually paid by such tenant or occupier."

The case was argued in *Michaelmas* Term, 1861, *November* 15th and 19th ; before WIGHTMAN and BLACKBURN JJ.

Coleridge (*Dowdeswell* with him), for the plaintiff.

Sir *F. Kelly* (*Bovill, Lush* and *F. M. White* with him), for the defendants.

The arguments sufficiently appear in the judgment. In addition to the two statutes above mentioned, the following statutes and authorities were referred to.

4 *W. & M. c.* 1. ss. 5, 6, 13, 34 ; 36 *Geo.* 3. c. 52. ss. 6, 13, 16, 21, 24, 27, 28 ; 38 *G. 3. c.* 60. ; *Giles v. Hooper* (a), *Brewster v. Kitchen* (b), *Bradbury v. Wright* (c), *Barksdale v. Gilliat* (d), *Noel v. Lord Henley* (e), *Louch v. Peters* (f), *Stow v. Davenport* (g), *Wall v. Wall* (h), *Amfield v. White* (i), *Lethbridge v. Thurlow* (j), *Sadler*

(a) *Carth.* 135.

(b) 1 *Ld. Raym.* 317 ; *S. C. nom. Brewster v. Kidgell*, *Carth.* 438 : also reported, *nom. Brewster v. Kidgel*, 12 *Mod.* 166.

(c) 2 *Doug.* 624.

(d) 1 *Swanst.* 562.

(e) 7 *Price*, 241.

(f) 1 *M. & K.* 489.

(g) 5 *B. & Ad.* 359.

(h) 15 *Sim.* 513 ; 16 *L. J.* 305, *Chanc.* ; 11 *Jur.* 403.

(i) *R. & M.* 246.

(j) 15 *Beav.* 334.

v. *Richards* (a), *The Attorney General v. Shield* (b) and
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Cur. adv. vult.

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The judgment of the Court was now delivered by

BLACKBURN J. This was a special case, argued before my brother *Wightman* and myself in the last Term.

It appears from the statement in the case that the late Duke of *Somerset*, by his will, devised certain lands to devisees and their heirs, to uses, (amongst others) "to the use and intent" that his wife, *Margaret* Duchess of *Somerset* (one of the now defendants), might, after his decease, yearly receive, during her life, "one yearly rent charge of 2200*l.*," to be charged upon and issuing out of the lands mentioned, and to be paid half yearly, "without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rent charge of 2200*l.*, or on the said *Margaret*, Duchess of *Somerset*, or her assigns, in respect thereof, by authority of Parliament or otherwise howsoever."

There then follows, in the usual form, a power of distress in case the rent charge, or any part thereof, be "in arrear and unpaid" for thirty days; and a power of entry, if it be "in arrear and unpaid" for forty days; and then follows a term of 600 years, the trusts of which are in case the rent charge, or any part thereof, "be in arrear and unpaid" for sixty days, to raise the money and pay it.

(a) 4 K. & J. 302.

(b) 3 H. & N. 834.

(c) 1 John. & H. 334.

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The present Duke of *Somerset* is in the receipt of the rents and profits of the lands upon which the rent charge is charged. He has paid to the Duchess Dowager the annuity of 2200*l.*, short of the amount of income tax due in respect of it. We must take it to be the fact, though it is not explicitly so stated, that the income tax on the lands on which the rent is charged has been duly paid to the Crown by the tenants in occupation, and duly allowed to those tenants out of the rents payable to their landlord, who is either the present Duke or a trustee for him. If the Duchess is entitled at law to enforce payment of the 2200*l.* per annum, without deduction for any income tax, it is admitted that 504*l.* 8*s.* 4*d.* is in arrear and unpaid; but if the payments of income tax by the terre tenants to the Crown operate as payment to the devisee of part of the rent charge, so that only the balance of the 2200*l.* would remain due after the payment of the tax, then she has been paid in full. The plaintiff on the record is a tenant of part of the lands, and to raise the question a formal distress has been made upon him: but the real parties are the Duke of *Somerset* and the Duchess Dowager; and the question asked us is the real question in controversy, viz., Whether the defendant, *Maryaret* Dowager Duchess of *Somerset*, was entitled to have the annuity paid in full, and free from deduction in respect of income tax.

On the argument before us, it was properly admitted by Mr. *Chichester*, who argued for the Duke, that the words used in the will were quite as strong as if the testator had expressly said that it was his intention that the rent charge was to be paid in full, and free from any deduction in respect of income tax then existing or in future to be imposed, and that the only question was,

whether the intention of the testator so declared was operative as against those taking the lands under the will. That depends upon the true construction of the Income Tax Act of 1842 (5 & 6 *Vict. c.* 35.), the provisions of which have been incorporated in the present Income Tax Act. By sect. 60, Sched. (A.), No. IV., rule 9; the occupier of any lands &c., being tenant thereof, and paying the duty on them, shall deduct from the rent payable to his landlord the proportion of the tax in respect of the rent, who shall allow the same; "and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable." By the 10th rule, where any such lands &c. are subject to the payment of any rent charge, the landlord by whom any such deduction has been allowed, and the owner, being also occupier and charged to the duties, shall deduct and retain out of the rent charge so much of the said duties as is proportioned to the rent charge; and all persons entitled to such rent are required to allow such deduction upon the receipt of the residue of such moneys as shall be due for such rents; and the landlord and occupier respectively, being charged as aforesaid, or having allowed such deduction, "shall be acquitted and discharged of so much money as if the same had been actually paid unto such person to whom such rent charge &c. shall have been due and payable."

By section 103 penalties are imposed "if any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. IV., Schedule (A)." "And all contracts, covenants, and agreements made or entered into, or to be made or

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entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

These provisions are taken verbatim from the old Income Tax Acts in the time of *George* the Third, so that the decisions on the old Acts are authorities to guide us in the present case.

The intention of the Legislature appears to us to have been that the burthen of the income tax should be borne by the person who received the income; they have therefore enacted that if the income tax on lands be paid by the tenants, and allowed by their landlords, and there is a rent charge issuing out of those lands, the owner of the rent charge shall allow a deduction of the amount of the income tax on the rent charge, and the owners of the land shall be acquitted and discharged of so much money as if actually paid to the owner of the rent charge. The Legislature meant to overrule and disregard the intentions of the parties, and have therefore expressly avoided any contracts for the payment in full without allowing any deduction: so that, if this present rent charge had been created by a settlement inter vivos, to which the present Duke was a party, and if the present Duke had covenanted to pay the rent charge in full and without claiming the deduction, his covenant would have been void, and the deduction must have been allowed.

This was decided in *The Attorney General v. Shield* (a), and is in conformity with the decisions on the former Acts, from which the present enactments are taken. Under these it was at first made a question whether the whole rent would not in such a case be void, but it was determined, and no doubt quite rightly, that only so

(a) 3 H. & N. 834.

much was void as stipulated for the payment without deduction; see *Fuller v. Abbott* (a), *Tinckler v. Prentice* (b), *Howe v. Synge* (c).

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Sir *Fitzroy Kelly* contended that it was otherwise in the case of a rent charge created by a devise, and in the course of his argument cited and relied upon the decisions as to legacy duties and as to land tax.

The provisions of the Legacy Act are totally different from those now in question. It was no part of the scheme of the Legislature that a legacy tax should always be borne by the legatee, and there are no expressions indicating that they had such an object. The 21st section of the 36 G. 3. c. 52., which exempts from legacy duty any sum which, by the directions in the will, is made payable out of some fund other than the legacy, so that the legatee may obtain the legacy free from duty, is in itself sufficient to shew that no such object was contemplated.

By the Land Tax Act (4 W. & M. c. 1.) a pound rate of 4s. in the pound was imposed on all lands. By sects. 5 and 6 it was enacted that the charge should be on the real value of the land in the hands of the occupiers, and that the owners of any lands charged with a rent charge might keep in their hands 4s. in the pound from every rent charge issuing out of the premises, and the owners of the rent charge were required to allow such deduction on the receipt of the residue of the money due for such rent. There are, in these sections, no express words providing that payment of the 4s. in the pound by the terre tenants shall have the same effect as payment pro tanto of the rent charge, but the effect is nearly the same. Sect. 13 provides

(a) 4 Taunt. 105.

(b) 4 Taunt. 549.

(c) 15 East, 440.

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that, where the tenant has paid the pound rate, he shall be discharged and acquitted to his landlord as if so much rent had been actually paid. Had the statute stopped there, it would have been a fair question whether the Legislature did intend to overrule the private arrangements of the parties creating the rents. Lord *Holt* seems to have thought they would not have been taken so to intend, and probably it would have been so; but section 34 leaves no doubt about it, for there it was provided that nothing in the Act contained should be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or others touching the payment of taxes or assessments; anything therein contained to the contrary notwithstanding.

In the Income Tax Acts the provision is exactly the contrary,—instead of enacting that the contracts shall be unaffected, it is enacted that they shall be void, and accordingly the decisions have been precisely opposite.

Thus, in *Giles v. Hooper* (a), where there was a lease rendering 80*l.* per annum, free from taxes; it was adjudged that the render made a covenant, and that the tenant was bound to pay without any deduction for land tax.

In *Tinckler v. Prentice* (b) there was a demise rendering 82*l.*, free and clear of land tax and property tax; and it was adjudged that so much as stipulated that the rent should be free of property tax was void, and the tenant might make the deduction. In truth, the fact, that the enactment in the Property Tax Act was worded as it was after the decisions on the Land Tax Act, is to my mind conclusive that those who framed the latter Act intended to impose the tax upon the rent charge in spite of the intention of those who created it.

(a) *Carth.* 135.(b) 4 *Taunt.* 549.

It was urged, by Sir *Fitzroy Kelly*, that this was not a contract, but a devise; and that a devise would, at all events, create a trust. He cited several cases in the Courts of equity where trusts have been created to pay annual sums without deduction of taxes: in most of those cases, as in *Wall v. Wall* (a), *Lethbridge v. Thurlow* (b) and *Sadler v. Richards* (c), the decision was that the terms used were not sufficient to indicate an intention that the annuity should be paid free of income tax, but in *Turner v. Mullineux* (d) the Vice Chancellor did direct that the annuity should be paid free of income tax. It does not appear from the report that the point was taken or argued, or that any reference was made to the terms of the Income Tax Act; but they can hardly have escaped the Vice Chancellor's notice. But, it may well be, that a trust created to pay money may be governed by one set of considerations, and a legal charge by another. If there is any ground for saying that the will creates a trust to discharge the income tax out of some fund for the benefit of the Duchess, application must be made to a Court of equity to declare and enforce that trust. We, in a Court of law, cannot decide upon any equitable ground. The Duchess is possessed of a legal rent charge, and, if it is paid partly in money and partly by the operation of the statute, it is no longer in arrear, and cannot be enforced at law.

There remains one further point to notice. It was said that the devise might be construed as giving, not a rent charge of 2200*l.*, but an annuity varying in amount according to the rate of the income tax for the time being, and always consisting of so much money as would, after the income tax was paid, leave 2200*l.*: so that,

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(a) 15 *Sim.* 513.(b) 15 *Beav.* 334.(c) 4 *K. & J.* 302.(d) 1 *John. & H.* 334.

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if ever the income tax should be abolished, the annuity should fall to 2200*l.*; if it should ever be raised to 20*s.* in the pound, the annuity should rise to 4400*l.*; and in the mean time should fluctuate from time to time, according as the income tax is 7*d.*, 9*d.*, or 10*d.* The grant, if thus construed, would, in case the income tax was paid, entitle the grantee to recover only 2200*l.*; but, if it was not paid, to levy by distress more than 2200*l.* per annum, which certainly was not intended.

Such an argument might have been equally used in *Tinckler v. Prentice* (a), but was not; it was used in *The Attorney General v. Shield* (b), where my brother *Martin* asked a pertinent question, whether such a fluctuating sum could be given as a rent.

We need not inquire whether such a varying annuity could be thus created. The testator has not attempted to do so; he has created by express and plain words "one yearly rent charge of 2200*l.*" He has expressed his intention that payment of taxes by the terre tenants shall not be part payment of the rent charge thus granted; but we think that, as far as payment of income tax is concerned, the Legislature has annexed to such a rent charge an inseparable incident that payment of income tax by the terre tenants shall be part payment of such a rent charge, and that the intention of the Legislature must prevail over that of the testator if he intended to include income tax in the expression "without any deduction or abatement whatsoever on account of any taxes, charges, impositions, or assessments already or to be hereafter taxed, charged, assessed or imposed &c., by authority of Parliament, or otherwise howsoever."

We therefore give judgment for the plaintiff.

Judgment for the plaintiff.

(a) 4 *Taunt.* 549.

(b) 3 *H. & N.* 834. 836.

IN THE EXCHEQUER CHAMBER.

FESTING *against* TAYLOR and the Dowager
Duchess of SOMERSET.*Thursday,*
November 6th.

For head note, see ante, p. 217.

ON this judgment, the defendants brought error, and the case was argued after *Trinity* Term, 1862, 18th *June*; before ERLE C. J., POLLOCK C. B., WILLIAMS, WILLES and BYLES JJ., MARTIN and CHANNELL BB.

Lush (*F. M. White* with him), for the defendants. —The question is whether the Dowager Duchess of *Somerset* is entitled to the full amount of the rent charge devised to her by her husband, or whether the income tax payable by her was rightly deducted from it. It appears from the language of the will, and indeed was admitted by the plaintiff's counsel on the argument in the Court below, that such was the intention of the devisor, and it only remains to consider whether the Income Tax Acts prohibit that. [*Coleridge*, for the plaintiff, admitted that this was the question, and that the intention of the devisor was as stated by *Lush*.] The judgment of the Court below proceeded on the assumption that the question was whether the Duchess had a right to distrain the tenants on the land for the rent charge,—a question beside the real one, which is between the Duchess, as owner of the rent charge, and the present Duke, as devisee under the will. Nor does

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the question depend on any distinction between legal and equitable rights, seeing that the Property and Income Tax Acts are binding in Courts of equity as well as in Courts of law, and it is accordingly immaterial whether the Duchess takes this money herself or receives it through the trustees.

There is nothing in the Property and Income Tax Acts to prevent the intention expressed in this will from taking effect.

The 5 & 6 *Vict. c. 35. s. 60.*, Schedule (A), No. IV., Rules 9 and 10, will be relied on by the other side: but those provisions were introduced for the benefit of the tenant; and seem copied from the Land Tax Act, 4 *W. & M. c. 1.*, sect. 13 of which enacts, "And the several and respective tenants of all and every the manors, messuages, &c. which by virtue of this Act shall be chargeable with any pound rates, as aforesaid, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such manors, &c., and to deduct out of their rents so much of the said rates, as in respect of the said rents payable for such manors, &c. the landlord should and ought to bear. And all landlords, both mediate and immediate (according to their respective interests) are hereby required to allow such deductions and payments, upon receipt of the residue of the rents: And every tenant, paying the said assessments of the pound rates, shall be and is hereby acquitted and discharged for so much money as the said assessment shall amount unto, as if the same had been actually paid unto such person or persons unto whom his rent should have been due and payable."

There is, however, this important difference between the two Acts, that sect. 34 of the Land Tax Act provides

"that nothing in this Act contained, shall be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or others touching the payment of taxes or assessments, &c.;" whereas sect. 103 of the 5 & 6 Vict. c. 35. enacts that "all contracts, covenants, and agreements &c., for the payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." But that section does not prohibit the giving property by *will* free of income tax. A man has a right to devise as much of his property as he pleases to another; and no wrong is done to the revenue by devising to a party a rent charge, and an annuity of so much over as will satisfy the income tax, seeing that the Crown is paid by the tenant in the first instance.

In *Brewster v. Kitchen* (a) it was held that a covenant to pay a rent charge, without deducting for any taxes, extends to taxes of a similar nature and for like purposes with those before imposed, though not then subsisting.

In *Stow v. Davenport* (b), where lands were devised to trustees on certain trusts, and, among others, that the wife of the deviser *should take from and out of the same premises an annuity or yearly rent charge, to be paid clear of all taxes and deductions*, it was held that the annuity was to be paid clear of legacy duty, under 36 G. 3. c. 52. and 45 G. 3. c. 28.

In several cases in the Court of Chancery, the question has been discussed whether, on the true construction of a particular will, the deviser intended to exempt the devisee from the payment of income tax; *Turner v.*

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(a) 1 *Ld. Raym.* 317.(b) 5 *B. & Ad.* 359.

1862. *Mullineux (a)*,—a discussion which would have been superfluous if a statute had prohibited his so doing.

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In *Colbron v. Travers (b)*, where landed property was demised for a term of years at a certain rent, with a proviso that, if the income tax should not be payable at any period during the term, the rent should be reduced by a certain amount, this was held not to be an evasion of the Property and Income Tax Acts.

Coleridge (Dowdeswell with him), contra.—If any question depends on the power and duty of the trustees, as between them and the cestui que trust, that is matter for a Court of equity. But the question here is a simple legal one,—namely, what is the right of the owner of a rent charge created by devise, as against the owner of the property on which the rent charge is imposed?

The Property and Income Tax Acts render void any instrument by which the owner of a rent charge is excused from income tax; the intention of the Act being that the person who enjoys the income shall pay the tax; *Howe v. Synge (c)*, *Fuller v. Abbott (d)*, *Tinckler v. Prentice (e)*. In *Wall v. Wall (f)*, *Shadwell V. C.* says of the Property and Income Tax Act, 5 & 6 *Vict. c. 35.*, that it is quite plain, from its language, that the thing that is given is the thing that is to pay the tax. In *Lethbridge v. Thurlow (g)*, where there was a gift by will of a rent charge “clear of legacy duty and every other deduction whatsoever,” it was held not clear of the property or income tax. [He also cited *The Attorney General v. Shield (h)*.]

It is argued by the other side that sect. 103 of the

(a) 1 *John. & H.* 334.

(b) 6 *L. T. N. S.* 287; 12 *C. B. N. S.* 181.

(c) 15 *East*, 440.

(e) 4 *Taunt.* 549.

(g) 15 *Beav.* 334.

(d) 4 *Taunt.* 105.

(f) 15 *Sim.* 513. 520.

(h) 3 *H. & N.* 834.

5 & 6 *Vict. c.* 35. does not mention *wills*; but that was not necessary, as the case is fully provided for by sect. 60, Schedule (A.), No. IV., Rules 9 and 10.

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The true test is to consider whether the devisee could enforce her claim by distress. Now the Legislature could not have intended to expose the tenants of lands to be distrained on for varying amounts like this; beside which, the statute provides that payment of the income tax to the Crown shall be deemed payment to the landlord.

The cases on the Land Tax Acts are distinguishable, for those Acts contain no provisions invalidating contracts as the Property and Income Tax Acts do. *Barksdale v. Gilliat* (a) is an authority that the Legislature contemplated such cases.

The Legacy Duty Act, 36 *G. 3. c.* 52., enacts, sect. 21., "Provided always, and be it further enacted, that if any direction shall be given, by any will or testamentary instrument for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty"; and there are analogous provisions in the subsequent Acts on the subject.

Lord Lovat v. The Duchess of Leeds (b) may be relied on, but there was a collateral fund specifically appropriated to meet the liability to the taxes. *Colbron v. Travers* (c) was rightly decided; for there was nothing

(a) 1 *Swanst.* 562.

(b) 10 *W. R.* 397; 2 *Drew. & Sm.* 62.

(c) 6 *L. T. N. S.* 287; 12 *C. B. N. S.* 181.

1862. to impeach the contract between the landlord and tenant;
 FESTING and in *Turner v. Mullineux* (a) the present point was not
 v. raised.
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Lush, in reply.—The answer to the argument that it was unnecessary to provide for *wills*, in sect. 103 of 5 & 6 *Vict. c. 35.*, because that case was provided for by Rules 9 & 10 of sect. 60, Sch. (A.), No. IV., is, that those Rules provide for cases of *contract* also, so that sect. 103 would be altogether useless.

Lord Lovat v. The Duchess of Leeds (b) is an express authority on the point; whereas the question was not raised in *Wall v. Wall* (c), *Lethbridge v. Thurlow* (d), or *Howe v. Synge* (e). *The Attorney General v. Shield* (f) was the case of a *contract*, and consequently within the express words of sect. 103 of 9 & 10 *Vict. c. 35.*

Cur. adv. vult.

The judgment of the Court was now delivered by

ERLE C. J. The question in this case arises upon a will, the construction of which is undisputed. The testator thereby devised to his wife, now Dowager Duchess of *Somerset*, a rent charge of 2200*l.* per annum, to be free from income tax, and created a trust term to insure its payment. She has distrained for arrears without allowing income tax, following therein the terms of the will and the admitted intention of the testator.

If she was liable, notwithstanding the terms of the will, to allow the income tax, there ought to be judgment

(a) 1 *John. & H.* 334.

(b) 10 *W. R.* 397; 2 *Drew. & Sm.* 62.

(c) 15 *Sim.* 513.

(e) 15 *East*, 440.

(d) 15 *Beav.* 334.

(f) 3 *H. & N.* 834.

for the plaintiff, but, if the will is to prevail, there ought to be judgment for the defendants.

On the part of the plaintiff it was argued that the will was inoperative, in so far as it directed that the rent charge should be clear of income tax, and that by reason of The Income Tax Act, 5 & 6 *Vict. c. 35.*, which authorizes this deduction, by a landlord or owner being occupier and charged to the income tax, of a proportion of the tax from a rent charge, and, by the 103rd section, imposes penalties upon any person refusing to allow any deduction authorized to be made by this Act out of, inter alia, any such rent, and enacts that "all contracts, covenants, and agreements made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." Upon this ground the Court of Queen's Bench gave judgment for the plaintiff.

The defendants, on the other hand, contend: First, that the 103d section, in terms, excludes wills, and that it is therefore competent to a testator to direct that a rent charge created by his will shall be free from income tax, although that cannot be done directly by a "contract, covenant, or agreement" inter vivos, which alone are mentioned in the statute; secondly, that, at all events, the trust term might be resorted to to enforce payment of the entire charge clear of income tax, and that the question in the case being one of substance as to what amount was payable under the will, ought to be answered in favour of the defendants; and, lastly, it was said that, if necessary, the will might be read as granting, over and above the 2200*l.* a year, an annuity proportioned to the income tax, which, from time to time, might be assessed upon the property, so that payment of 2200*l.*

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clear should be secured to the Duchess. Upon this latter point the cases collected in the notes to 4th *Jarman's Bythewood*, by *Sweet*, 162, tit. *Indemnity*, may be referred to. They were referred to and acted upon in an unreported case in this Court of *Girdlestone v. McGowan*.

It is unnecessary for us to express any opinion upon either of these points except the first, because upon that we are of opinion that the defendants' argument ought to prevail. The directions in the statute as to deductions from a rent charge apply generally without regard to whether the instrument creating the charge be *inter vivos* or testamentary, but such directions are quite consistent with a provision similar to that contained in section 34 of The Land Tax Act, 4 *W. & M. c. 1.*, that deeds, or other instruments should not be interfered with. Accordingly, we find it impossible to exclude from consideration this remarkable omission of wills in the 103d section of The Income Tax Act, which nullifies "contracts, covenants, and agreements made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction." This omission could not have been accidental, if to make out that would help the plaintiff, because, shortly before, wills are expressly referred to. Nor is it so absurd to suppose that wills should have been intended by the Legislature to stand upon a different footing from deeds, as to justify us in being astute to find reasons for introducing them into a nullifying clause, from which the Legislature has, for aught we can tell, deliberately omitted them.

From the nature of this question, both of the real parties to this litigation must have taken their respective

rights from the bounty or the forbearance of the testator. It is not a question which could properly arise in a Court of common law between the Duchess and a tenant whose interest was derived from the testator in his lifetime, and continued after his death. It must substantially be a dispute between the Duchess and either the Duke's heir, with whose succession he has not interfered beyond devising the rent charge, or his devisee, or a person or persons claiming under such heir or devisee. And it is not unreasonable that the rights of such persons should be governed by the terms of the will, so far as they are not clearly shewn to be contrary to law. This the more obvious because it must be admitted that, by a grant to trustees of a separate annuity of sufficient amount, upon trust to repay, from time to time, the amount of the income tax to the Duchess, and the residue to whoever might be entitled subject thereto, the object of the testator might become legally and effectually accomplished. This devise as it stands does more directly, and in our opinion with equal effect, produce the same result.

Upon this ground we reverse the judgment complained of, and give judgment for the defendants.

Judgment reversed.

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Thursday,
November 13th.

BINKS, administrator of BINKS, *against* The SOUTH
YORKSHIRE Railway and River DUN Company.

Public nuisance.
Footway.
Canal.
9 & 10 Vict.
c. 93.

1. The owner of land adjoining a public road is under no obligation to fence excavations in his land unless they are so near to the road as to be dangerous to persons lawfully using it.

2. Where a canal Company constructed a canal by the side of an ancient public footway, at a distance of about twenty-four feet from it, with a towing path on the bank of the canal, and an intermediate space between them, and, in consequence of the acts of persons authorized by the Company, the distinction between the footway and the canal had become obliterated; and it appeared that, although the public had no *right* to pass over the intermediate space between the footway and the canal, they were permitted by the Company to do so without objection: Held, that the Company were under no obligation to fence the canal; and consequently that no action lay against them, under the 9 & 10 Vict. c. 93., by the personal representative of a party who had quitted the footway, and, in consequence of the dangerous state of the canal, fell in and was drowned.

THIS was an action, under 9 & 10 Vict. c. 93., by the plaintiff, as father and administrator of *Benjamin Binks*.

The declaration alleged that the defendants were possessed of land near to and adjoining an ancient common and public footway, and had made and constructed and were possessed of a certain hole, ditch, cut and canal in and upon the said land, and adjoining and close to and by the side of the said ancient and common and public footway, and being wholly unfenced, unguarded and unlighted by day or by night, and then containing a large quantity of water; that the existence of the said hole, ditch, cut and canal so being in and upon the land so adjoining the said ancient and common and public footway, and so being wholly unfenced, unguarded and unlighted by day or by night, and so containing a large

quantity of water, was dangerous to any person passing along the footway, either by night or day, even if ordinary care were employed by such person, and was a nuisance to the said ancient and common and public footway, and to all persons using the same; and the defendants, by reason of the premises and of their possession of the said land, ought to have sufficiently guarded, fenced off, railed in and lighted the said hole, ditch, cut and canal so as to prevent damage or injury to any person or persons lawfully passing in and along the footway: yet the defendants, whilst they were so possessed of the land, and of the hole, ditch, cut and canal as aforesaid, wrongfully and contrary to their duty in that behalf, permitted and suffered the land and the hole, ditch, cut and canal to be and continue, and the same were, before and at the time of the death of *Benjamin Binks*, so wholly unguarded, not fenced off or railed in, and without any light, that by reason of the premises, and by reason of the existence of the hole, ditch, cut and canal in and upon the land and adjoining the ancient and common and public footway so wholly unfenced, unguarded and unlighted as aforesaid by day or by night, and containing a large quantity of water as aforesaid, and by reason of the want of proper and sufficient guarding, fencing off, and railing in and lighting of the hole, ditch, cut and canal as aforesaid, the said *Benjamin Binks*, who was lawfully passing in and upon the footway, lost his way, missed his path, slipped and fell into the hole, ditch, cut and canal, and was thereby killed, &c.

Pleas. First, not guilty. Secondly, that the defendants were not possessed of the land near to or adjoining

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the ancient common and public footway. Thirdly, that the defendants had not made and constructed, nor were they possessed of, the hole, ditch, cut and canal in or upon the land of the defendants, adjoining or close to or by the side of the ancient, common and public footway. Fourthly, that the existence of the hole, ditch, cut and canal so being on their land was not dangerous to any person passing along the footway, either by night or by day, nor was it a nuisance to the ancient and common and public footway, nor to all persons using the same. Fifthly, that it was not the duty of the defendants to have so sufficiently guarded, fenced off, railed in and lighted the hole, ditch, cut and canal as to prevent damage or injury to any person or persons lawfully passing along the same.

On the trial, before *Martin B.*, at the Summer Assizes at *York*, 1861, it appeared that the deceased was sixteen years old, earning 6s. a week as an apprentice, and was also employed by a tradesman at *Rotherham* to go errands, for which he received from 2s. 6d. to 4s. a week. On the 6th *March*, 1861, he was sent on one of these errands to *The Holmes*. He started by the 7 o'clock train from *Rotherham*, but, through some mistake, instead of getting out at *The Holmes*, he went on to *Brightside*, and, not having sufficient money to pay his fare back, he set off to walk to *The Holmes* along a footpath, the night being wet and dark. The deceased had reached *Jordan Cottages*, by the side of a canal of which the defendants were proprietors, and, after resting there a short time, he resumed his journey, and had proceeded along the footpath mentioned in the pleadings, but shortly afterwards fell into the canal and was drowned.

This footpath is an ancient footpath from *Sheffield* to *Rotherham*. From *Jordan Dam* to half way towards *The Holmes* it follows the margin of a goit or ditch, as to which there was no evidence when it was made: there was a slight breadth of grass between the footpath and the goit or ditch. The defendants constructed their canal in 1834, under the powers of an Act of Parliament, and afterwards made a towing path about eight feet wide. In the first instance there was grass land between the foot path and the towing path all the way from *Jordan Dam* to *The Holmes*; the width of the grass varying from nothing to four or five yards. Soon after the canal was opened the tenant of the land beyond *Jordan Dam* asked permission to cart up the bank along the canal or strip of land between the towing path and footpath: this was conceded by the defendants upon a payment of 2s. 6d. a year, and they also received 1d. for every cart belonging to other persons who used the road. This use of the road destroyed the grass between the footpath and the towing path; and the defendants, for the purpose of repairing the road and footpath, had covered the surface of both with ashes or cinders. At the place where the body of the deceased was found the footpath was close to the goit. The whole space between the goit and the canal was about twenty-two or twenty-four feet wide, the towing path being six feet wide, the footpath three or four feet wide, and the remaining space, about fourteen or fifteen feet wide, being between the footpath and the towing path: the surface of that space was the same, so that the footpath was undistinguishable from the road. The canal was unfenced and unprotected.

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By consent, a verdict was entered for the plaintiff, with 60*l.* damages, leave being reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that there was no evidence on which the jury could properly find a verdict for the plaintiff.

In the following *Michaelmas* Term,

Edward James obtained a rule nisi accordingly; which was argued in this Term, *November* 10th and 13th, on which latter day judgment was given.

Mellish and *J. Kay* shewed cause.—The defendants are liable in this action, as their canal is a dangerous nuisance to persons passing along the footpath. Perhaps the defendants would not have been answerable for any mischief to persons passing along the footpath and falling into the canal when it was first made, nor as long as the distinction between the footpath and the towing path continued; but as soon as the footpath ceased to be distinguishable from the towing path, by reason of the defendants procuring or permitting the boundary between them to be obliterated, the canal became a dangerous nuisance. It is not necessary that the nuisance should adjoin the highway. In *Barnes v. Ward* (*a*) *Maule J.*, in delivering the judgment of the Court, said, p. 420 :—“The result is,—considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of acci-

(*a*) 9 *C. B.* 392.

dentially deviating from the road." *Bird v. Holbrook* (a) was there relied on as an answer to the objection that the deceased was a trespasser on the defendant's land at the time the injury was sustained. In *Hardcastle v. The South Yorkshire Railway and River Dun Company* (b) there was a substantial space between the path and the excavation, and the deceased, instead of following the path which turned to the right over a bridge, walked straight on, and so fell into the excavation; and *Pollock C. B.*, delivering the judgment of the Court, said, pp. 74, 75 :—"When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into [it] would be a trespasser upon the defendant's land before he reached it, the case seem to us to be different. We do not see where the liability is to stop. *** We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way." In *Hounsell v. Smyth* (c), where a quarry was in a common near to and between two public highways leading over the common, it was held that there was no ground of action; but *Williams J.* said, p. 742 :—"The general doctrine as to the non-liability of owners of land to fence excavations therein was qualified to this extent by

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(a) 4 *Bing.* 628.(b) 4 *H. & N.* 67.(c) 7 *C. B. N. S.* 731.

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those" (i.e. *Barnes v. Ward* (a) and *Hardcastle v. The South Yorkshire Railway and River Dun Company* (b)) "amongst other cases, that the excavation must not be made so near to a public road as to amount to a public nuisance, and that, if it do amount to a public nuisance, and a particular injury result therefrom to an individual, an action will lie,—on the well established principle of law, that, where a particular injury results from a public nuisance, it is the subject of compensation in damages to the individual by whom such injury is sustained." In the present case the defendants have undertaken to define what the footpath is to which the public are entitled, and that it extends to the edge of the canal; and any person using the towing path as a footpath might plead leave and license to an action of trespass by the Company. [*Blackburn J.* The act of which the plaintiff complains is nonfeasance rather than misfeasance. *Wightman J.* Must not a person who has the easement of a way over the land of another take care to use that way only? *Mellor J.* Suppose a hot or dry summer in which the grass which used to form the boundary line between the footway and the towing path withered and died.] On a fall of snow in the winter: in those cases the canal without a fence would become a nuisance.

Edward James, Cleasby, and Hannay, in support of the rule.—An action will doubtless lie for injury to an individual resulting from a public nuisance; but *Hardcastle v. The South Yorkshire Railway and River Dun Company* (b) and *Hounsell v. Smyth* (c) are authorities

(a) 9 C. B. 392.

(b) 4 H. & N. 67.

(c) 7 C. B. N. S. 731.

that the present action cannot be maintained. This canal was clearly not a public nuisance at the time when it was constructed, and nothing has been done since to make it such. There was no evidence from which a license on the part of the defendants to the public to use the intermediate land and the towing path could be presumed; and, if there had been such a license, the persons taking advantage of it must take it with its risks. Where a highway runs through land, the owner is not bound to fence a dangerous bog upon the land which is at a distance from the highway. (They were then stopped.)

WIGHTMAN J. I am of opinion that this rule should be made absolute. The declaration alleges the existence of an ancient common and public footway, and that adjoining and close to and by the side of it was a canal, the property of the defendants, which being "wholly unfenced, unguarded and unlighted by day or by night, and containing a large quantity of water, was dangerous to any person passing along the footway, either by night or by day, even if ordinary care were employed by such person, and was a nuisance to the footway, and to all persons using the same." Here the canal is said to be adjoining a common and public footway. In truth it was not,—it was at the distance of several feet,—about twenty-four. It is true that there was no fence, properly so called, between the public highway and the canal, to prevent persons passing from the former to the latter, and it seems that, from circumstances, the distinction between the pathway and the intermediate space had become obliterated.

Now I adopt the view taken by the Court of Common

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1862. *Pleas in Hounsell v. Smyth (a)*, and in particular that part of the judgment of *Keating J.* in which he says, p. 746, "To throw upon the owners the obligation of fencing this excavation in their waste land adjoining the roads, it ought to be shewn that the excavation was so near to the roads as to be dangerous to persons lawfully using them." And *Williams J.*, p. 743, observes, "No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils."

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There can be no question that here the public have been permitted without objection to pass over the intermediate space between the road and this dangerous canal; but no *right* in them to pass over it is alleged,—they have at most only a mere permission, and those who take that permission must take it with all chances of meeting with accidents. The defendants were not under any obligation to fence the highway against the canal, which was not shewn to be so near as to be dangerous to a person using the road in the regular line.

BLACKBURN J. I am of the same opinion. *Hardcastle v. The South Yorkshire Railway and River Dun Company (b)* is an authority in point, where it was held,

(a) 7 C. B. N. S. 731.

(b) 4 H. & N. 67.

in a considered judgment of the Court, that the excavation into which a party falls must be adjoining to a public way, in order to render the owner of the land liable for the mischief. The Lord Chief Baron, in delivering judgment, says, pp. 74—5, "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. * * * * We think that the proper and true test of legal liability is, whether the excavation be *substantially* adjoining the way, and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous." I do not say whether that decision is right or wrong: in either event we are bound by it in this Court; and it is not a question for the jury, but for the Judge, Was the excavation substantially adjoining the way? I do not think it is possible, on the evidence here, to say that this canal was adjoining to the highway originally. There was an intervening breadth of towing path, of about nine feet, and a strip of grass, which was agreed to be a marked and real distinction.

In order to distinguish this case from that to which I have referred, it was argued that such alterations had been made in the towing path that they obliterated the distinction between it and the footway, and so rendered it not noticeable, especially at night, and

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consequently dangerous. But I do not think that that amounts to making the canal adjoin the footway, if it did not do so before.

There may possibly be cases where the owner of land adjoining a way, may by his acts, induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not. But that should be distinctly proved, whereas the only evidence adduced here amounts to nothing of the kind.

MELLOR J. *Hardcastle v. The South Yorkshire Railway and River Dun Company* (a), explaining as it does *Barnes v. Ward* (b), is rightly decided, and I think the only difference between that case and the present is, that the judgment there assumes that the going off the towing path would be a trespass; here perhaps trespass would not be maintainable. The persons here who say that they are not trespassers by going out of the footway must take their licence with its dangers.

There was therefore no evidence to go to the jury, and this rule must be made absolute.

Rule absolute.

(a) 4 H. & N. 67.

(b) 9 C. B. 392.

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The QUEEN *against* BRAY.Monday,
November 3d.

1. Under The Vexatious Indictments Act, 22 & 23 Vict. c. 17., it is sufficient if the consent of the Judge to the prosecution is given in writing; and no previous summons or notice to the party, or even affidavit of the facts, is necessary.

2. The Court will not interfere with the exercise of the discretion of the Judge under this statute.

3. A person having given evidence at a trial, the Judge did not give any direction to prosecute him for perjury. About a fortnight afterwards, application was made to the same Judge for his consent for that purpose. The party had received no notice of the application, which was not founded on either summons or affidavit; but a copy of a newspaper, containing a report of the proceedings at the trial, was laid before the Judge to refresh his memory as to the facts, on which he wrote "I consent to the prosecution in this case." held sufficient within the statute.

*Vexatious
Indictments
Act, 22 & 23
Vict. c. 17.
14 & 15 Vict.
c. 100.
Consent of
Judge.
Interference
of Court.*

THIS was an application for a certiorari to bring into this Court an indictment for perjury found at the Central Criminal Court, in order that it might be quashed for want of jurisdiction. The question had been before *Mellor J.* at Chambers, who referred it to the Court.

Stat. 22 & 23 Vict. c. 17. s. 1. enacts: "No bill of indictment for any of the offences following, viz. perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in *England*, be preferred by the direction or with the consent in writing of a Judge of one

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of the superior Courts of law at *Westminster*, or of Her Majesty's Attorney General or Solicitor General for *England*, or unless such indictment for such offence, if charged to have been committed in *Ireland*, be preferred by the direction or with the consent in writing of a Judge of one of the superior Courts of law in *Dublin*, or of Her Majesty's Attorney General or Solicitor General for *Ireland*, or (in the case of an indictment for perjury) by the direction of any Court, Judge, or public functionary authorized by" stat. 14 & 15 *Vict.* c. 100. "to direct a prosecution for perjury."

Sect. 2. "Where any charge or complaint shall be made before any one or more of Her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the Court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence."

The perjury, the subject of the present indictment, was alleged to have taken place at a trial before *Mellor J.*, who did not then give any direction or leave for the prosecution of the now defendant, nor was any application made to him for the purpose until about a fortnight afterwards, when he was sitting at *Guildhall*. The defendant had received no notice of the intended

application, which was not founded on either summons or affidavit; but a copy of *The Times* newspaper, containing a report of the proceedings at the trial, was laid before the Judge to refresh his memory as to the facts, on which he wrote "I consent to the prosecution in this case," and affixed his signature.

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Woollett, (*Inglesant* with him), in support of the application.—The application to the Judge ought to have been preceded by a summons or other notice to the defendant; and been founded on some species of record, or, at least, on affidavit of the facts, in order to identify the party intended to be charged. [*Mellor J.* I referred these parties to the Court because, as cases of this kind often occur at chambers, I wished some rule to be laid down. *Cockburn C. J.* The Judge who tries the cause has merely to see if there is a *prima facie* case against the party, without asking him for an answer. It is otherwise with a justice of the peace, who knows nothing of the facts of the case. *Blackburn J.* It never occurred to me, or any other Judge, to call on the party in such a case.] It is only justice to the defendant to allow him an opportunity of explaining the evidence he gave. The circumstance of *Mellor J.* having been the Judge who tried the cause makes no difference, for, after it was over, he stood in the same position as any strange Judge. The statute was meant to protect persons against improper prosecutions, but the course here adopted would have the contrary effect. The Attorney General or the Solicitor General can act under this statute as well as a Judge, and, in *Reg. v. Allen* (*a*), *Cockburn C. J.* says, "Our attention has been called to the practice of the Attorney General in his office, as laid down in the books, to summon the

(a) 1 B. & S. 850. 854.

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prosecutor, and hear the parties before granting his fiat for a nolle prosequi. I think that is a wholesome practice."

COCKBURN C. J. There is no ground for this application. The sole object of the statute was to prevent the abuse of the right of prosecution, by proceedings instituted either vexatiously or from corrupt or sinister motives. With this view the statute imposes restrictive directions or conditions on certain prosecutions, by requiring the consent in writing of a Judge, &c. As to the circumstances under which that direction or consent shall be given, it has left them entirely within the discretion of the Judge, and the Court will not interfere with its exercise. In this particular case the Judge was in full possession of all the facts, and the case was identified before him as much as if the attorney had come with a paper setting out the facts. Upon that, his consent was given *in writing*, which is the only form required by the statute.

WIGHTMAN J. concurred.

BLACKBURN J. I am of the same opinion. When a matter of this kind is brought before me, if I know nothing about the case, I (and I believe other Judges adopt the same course) refuse to interfere, and tell the parties to go before a justice of the peace, where informations can be taken. That, however, is entirely a matter of discretion. But I have never doubted that, as my Lord Chief Justice says, where the Judge is satisfied that the case is a fit one for prosecution, and that it will not be frivolous or mischievous, he is not bound before giving his consent to issue a summons, or require evidence on oath.

MELLOR J. concurred.

Rule refused.

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PAGE *against* MEEK.*Friday,*
November 7th.

1. In an action on common counts the defendant pleaded that, in consideration that the defendant would at once pay to the plaintiff the whole of his claim, except a certain portion claimed by the defendant as a deduction from it, the plaintiff agreed that that sum should be deposited in the hands of a third party, to be held by him in trust for the plaintiff and defendant until the difference between them should be adjusted; alleging performance, and that the difference was still pending: Held good as a special plea of payment.

Payment.
Accord and
satisfaction.
Pleading.

2. *Quere*, whether the plea was good as a plea in accord and satisfaction?

DECLARATION for goods bargained and sold, goods sold and delivered, and on accounts stated.

Plea. That the whole of the claims of the plaintiff in the declaration mentioned are for and in respect of the sum of 721*l.* 17*s.* 6*d.*, being the price of 500 bags of rice, which, by a certain contract entered into between the plaintiff and defendant, the plaintiff agreed to sell to the defendant and to deliver on board a certain vessel, called *The Providencia*, and to be equal to a certain sample: and the defendant says that, after the sale and delivery of the said rice, a question or difference arose between the plaintiff and the defendant whether the said rice was or was not equal or inferior to the said sample, the defendant alleging and the plaintiff denying that the same was inferior to the said sample; and then, in consideration that the defendant would at once pay to the plaintiff, to wit, the sum of 681*l.* 17*s.* 6*d.*, being the whole of the price of the said rice and of the plaintiff's claim in this action, except 40*l.*, which was claimed by the defendant as a deduction from the said price in con-

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sequence of the said alleged inferiority in quality, the plaintiff agreed that the said sum of 40*l.*, being the residue of the said price, instead of being paid over directly to the plaintiff, should be deposited in the hands of certain persons (to wit) certain persons carrying on business in *London* under the style and firm of Messrs. *Blaikie & Co.*, to be held by them in trust for the plaintiff and defendant until the said difference as to the quality was adjusted between the said parties: and the defendant says that he performed the said agreement on his part in every respect, and paid to the plaintiff the said sum of 68*l.* 17*s.* 6*d.* as agreed, and the said sum of 40*l.* was then deposited as agreed with the said persons, and the same still remains in the hands of the said persons awaiting the adjustment of the said difference, which is still pending: and the defendant has always been and still is ready and willing to do and concur in all acts and matters necessary to bring the said difference to an adjustment according to the said agreement.

Demurrer, and joinder in demurrer.

Gray, in support of the demurrer.—The plea is bad as a plea of payment, for it shews that only a portion of the debt was paid to the plaintiff. Neither is it good as a plea of accord and satisfaction, for there is no averment that the fresh agreement was taken as such. Although it alleges that a portion of the money was deposited in the hands of a third party until the adjustment of the difference between the plaintiff and defendant it does not shew any agreement that that difference should be adjusted by arbitration or in other manner different from that prescribed by the ordinary course of law. The present action therefore lies. (He was then stopped.)

Watkin Williams, contra. — Agreements like the present are common in the city, and it is therefore desirable that a decision be pronounced as to their validity. The plea shews that, in place of the original contract between the parties, a new contract was substituted, by which the defendant was to pay a certain sum to trustees, to be held by them for the plaintiff or defendant as might be afterwards determined. When the defendant paid that sum into the hands of the third party, he performed his contract. [*Cockburn* C. J. What do you say to the objection, that it is not averred that this new agreement was received by way of accord and satisfaction of the old one?] It was not received in accord and satisfaction of the old one, its effect being merely to deprive the plaintiff of his right of suing upon it; *Stracy v. The Bank of England* (a), *Good v. Cheesman* (b). In order to render the consideration for a contract sufficient, it is not necessary that the thing to be done be for the benefit of the party sued; it is enough that it be productive of loss to the party suing. [*Wightman* J. Suppose your client refused to make an adjustment of the difference between the plaintiff and himself, would an action lie against him?] Yes. [*Wightman* J. A hardship might arise in this way. If this action lies, the defendant will have to pay the sum deposited with the stakeholder, to which it may turn out afterwards that the defendant was entitled.]

Ford v. Beech, in error (c), may be relied on by the other side, where it was held no answer to an action on two promissory notes, that after they became due it was

(a) 6 Bing. 754.

(b) 2 B. & Ad. 328.

(c) 11 Q. B. 852.

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Gray, in reply.—In order to render the agreement in the plea binding, it ought to have been set out according to its legal effect, which is either that the new agreement was taken in satisfaction of the original one, or that it was such as bound the plaintiff not to sue. The plea, being in confession and avoidance, admits the existence of the debt; although the defendant may have his remedy by cross action on the new agreement. In *Stracy v. The Bank of England* (*a*) the question arose on the general issue; if the defence had been pleaded specially, accord and satisfaction must have been alleged.

COCKBURN C. J. Our judgment must be for the defendant. I have a strong opinion that, both in law and in fact, the subject of this defence might have been pleaded as accord and satisfaction. Where there is an existing liability, and the parties come to an agreement respecting it that a new form of payment shall be substituted,—that instead of the price on which the plaintiff could have insisted under the original agreement, the defendant shall pay a sum down, and deposit the residue to abide the event of adjustment of the plaintiff's claim,—that is substituting new terms in satisfaction of the original liability.

But we need not decide the present case on that ground, because, when this record is looked at, we see

(*a*) 6 *Bing.* 754.

that this is a special plea of payment, *i. e.*, payment in a given manner. The plaintiff demands a certain sum as the price of a cargo of rice; the defendant says, I agreed with you to pay a certain sum down, and that the difference should be deposited in the hands of a third party to be disposed of on a certain event, *i. e.*, handed to you in the event of its being decided in your favour, and to me in the contrary event. On the whole that is a plea of payment, because the entire of the money is disposed of according to the will of the parties. It would be extremely hard if this plea could not be maintained; for then the defendant must pay immediately that portion of the money which was deposited in the particular quarter, and he might not afterwards be able to get it back.

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WIGHTMAN J. There can be no doubt that there is a technical difficulty here. It seems to me however that, so far as the original cause of action is concerned, this plea does amount, by necessary implication, to a special plea of payment. The defendant says, in effect, that he paid the whole amount of the claim, partly into the hands of the plaintiff and partly to a third party who is a stakeholder between them. Such an agreement may give a different cause of action to the plaintiff than he had originally, but that does not appear to be the case in the present instance. On the whole, therefore, I think that our judgment should be for the defendant.

MELOR J. I am of the same opinion. On the whole, although not without some doubt arising from the mode in which it is pleaded, I think that this plea alleges what is equivalent to the substitution of a certain mode of

1862. <hr style="width: 50%; margin: 0;"/> PAGE V. MEER.	payment for the mode of payment under the original contract, and that the defendant has paid the whole sum which he was bound to pay under the substituted mode. Judgment for the defendant.
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Friday,
November 14th.

YOUNG and others *against* MACRAE.

*Libel in way
of trade.
Defamation
of articles.*

1. *Semble*, that if a person falsely and maliciously disparages an article which another manufactures or vends, and special damage results therefrom, an action will lie, although in so doing no imputation was cast on the personal or professional character of the manufacturer or vendor.

2. A declaration for libel alleged that the plaintiff was patentee of an invention for obtaining Paraffine oil, and that the defendant falsely and maliciously composed and published a libel of him in the way of his trade, in the shape of a circular and report as follows: *Liverpool, 30th December, 1861 [M]. 500 casks American refined Petroleum Kerosine or Paraffine Oil, manufactured by The Portland Kerosine Company, Portland, United States, and imported by Messrs. Maclean, Maris & Co., merchants, sold by Alex. S. Macrae, broker, Liverpool. And such report being in these words. Professor Muspratt's Report. I certify that I have carefully tested the above oil, meaning the said oil in the said libel mentioned, and meaning an oil other than and different from the oil so manufactured, sold and traded in by the plaintiffs as aforesaid, and that I find it a colourless and somewhat aromatic liquid, while Young's Scotch, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate as aforesaid, has a reddish brown tinge, is much thicker, and has a more disagreeable odour than it, meaning the said oil in the said libel mentioned. I further certify that in burning the two oils comparatively in the ordinary one shilling lamp, I found the power of the light produced by the American, meaning the said oil in the said libel mentioned, equals four and a quarter wax candles. The sample of Young's, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate, burned under the same conditions in the same lamp, yields, while the lamp remains well filled, a light of nearly the same power as the American, but a feebler one after the oil has burned down to one half. The difference at this stage I find to amount to nearly the light of one such candle, or say twenty-five per cent., in favour of The Portland Kerosine Company's oil, meaning the said oil in the said libel mentioned. (Signed) Sheridan Muspratt, M.D., F.R.S., Fd., M.R.I.A., &c. &c., Professor of Chemistry: and divers of such libels, being composed only of the said report: whereby the plaintiff was injured in his trade, and the reputation of his oil injured, and the sale diminished; with allegations of special damage: Held that the declaration disclosed no ground of action: Dubitante Wightman J.*

THE declaration, after alleging that letters patent had been granted to the plaintiff Young for an inven-

tion of a process for obtaining, by the distillation of bituminous coals under particular conditions, the substance known as Paraffine, and also an oil containing Paraffine, which letters patent were afterwards, by indenture, vested in him in trust for himself and the other plaintiffs, proceeded thus. "And whereas, afterwards, and before and at the time of the committing of the grievances hereinafter mentioned; the said letters patent and the said privileges being then vested in the plaintiffs in manner aforesaid, the plaintiffs carried on business in partnership together, and still do carry on business in partnership together, as, amongst other things, manufacturers of and sellers of and traders in Paraffine oil, being the oil hereinbefore mentioned as the oil containing Paraffine in the said indenture mentioned, and to which the privileges granted by the said letters patent relate; the defendant, contriving and intending to injure the plaintiffs, before suit, falsely and maliciously composed and published divers and very many false, scandalous and malicious libels of and concerning the plaintiffs as such copartners, manufacturers and sellers, and of and concerning them as and in the way of their trade and business as such manufacturers, sellers and traders, divers of such libels being each composed of a circular and report, such circular being in these words: *Liverpool, 30th December 1861 [M]. 500 casks American refined Petroleum Kerosine or Paraffine Oil, manufactured by The Portland Kerosine Company, Portland, United States, and imported by Messrs. Maclean, Maris & Co., merchants, sold by Alex. S. Macrae, broker, Liverpool.* And such report being in these words. Professor Muspratt's Report. I certify that I have carefully tested the above oil, meaning the said oil in the

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said libel mentioned and meaning an oil other than and different from the oil so manufactured, sold and traded in by the plaintiffs as aforesaid, and that I find it a colourless and somewhat aromatic liquid, while *Young's Scotch*, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate as aforesaid, has a reddish brown tinge, is much thicker, and has a more disagreeable odour than it, meaning the said oil in the said libel mentioned. I further certify that, in burning the two oils comparatively in the ordinary one shilling lamp, I found the power of the light produced by the *American*, meaning the said oil in the said libel mentioned, equals four and a quarter wax candles. The sample of *Young's*, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate, burned under the same conditions in the same lamp, yields, while the lamp remains well filled, a light of nearly the same power as the *American*, but a feebler one after the oil has burned down to one half. The difference at this stage I find to amount to nearly the light of one such candle, or say twenty-five per cent., in favour of *The Portland Kerosine Company's* oil, meaning the said oil in the said libel mentioned. (Signed) *Sheridan Muspratt*, M.D., F.R.S., Fd., M.R.I.A., &c. &c., Professor of Chemistry. And divers of such libels being composed only of the said report. Thereby meaning and intending that the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate, was oil of an inferior quality to the said oil in the said libel mentioned, and yielded a feebler light than the light yielded by the said oil in the said libel mentioned under like conditions, and yielded and would

yield only an amount of light nearly the light of one of such wax candles as in the said libel mentioned less, or nearly or about twenty-five per cent. less, than was yielded and would be yielded under like conditions by the said oil in the said libel mentioned. By reason and in consequence whereof the plaintiffs have been prejudiced and injured in their said trade and business, and the reputation of the said oil so manufactured by the plaintiffs has been injured and the sale thereof has much diminished and fallen off, and the plaintiffs have thereby lost great profits which they otherwise would have made; and by reason and in consequence of the said premises divers persons, that is to say, &c., who, before the committing of the said grievances, were used to buy the said oil so manufactured by the plaintiffs, ceased to buy the same, and bought the said oil in the said libel mentioned instead thereof; and by reason and in consequence whereof also divers persons, that is to say, &c., who otherwise would have bought the said oil so manufactured by the plaintiffs, were induced to refrain from buying the same, and were induced to buy, and did buy, the said oil in the said libel mentioned instead thereof. And the plaintiffs claim 1000*l*."

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Demurrer, and joinder in demurrer.

Milward (*Gates* with him), in support of the demurrer. —The documents set out in the declaration are not libellous, for they mean nothing more than that the defendant's oil is superior to that of the plaintiff; which may be true for all that appears to the contrary. [*Cockburn* C. J. If this is a libel, the effect would be to put down ninety-nine out of every hundred advertisements of articles that we see.] There is no authority for saying that

1862. *things* can be the subject of libel. [*Blackburn J.* I certainly never saw a case which went so far as this.] A horse dealer has no right of action against a person who asserts that he has better horses. [He was then stopped.]

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Edward James (T. Jones, Northern Circuit, with him), contra.—These documents are a libel on the plaintiffs, as manufacturers of this oil; and, on demurrer, it must be taken that the statements in them were made falsely and maliciously as alleged in the declaration. Whenever a man is spoken of disparagingly in the way of his trade an action will lie, especially when special damage results. The assertion that Paraffine oil ought to be colourless, and that the plaintiffs' oil had a reddish brown tinge, is a depreciation of it. [*Cockburn C. J.* In order to be actionable, must not the disparagement be of a man's character?] In general that is so, but a distinction exists where, as here, an article is manufactured by him. In *Ingram v. Lawson (a)*, where the imputation was that a ship of which the plaintiff was owner and master was not seaworthy, and that Jews had bought her to take out convicts, this was held a libel on the plaintiff in his business as a shipowner and master mariner, without proof of special damage; although the judgments of the Judges shew that, merely as a disparagement of the quality of the ship, the action could not have been maintained without such proof. *Evans v. Harlow (b)* is to the same effect. [*Cockburn C. J.* The documents before us do not impute to the plaintiffs that the article they sell is of a bad quality in itself, but simply that it is inferior to some other.] They allege that the plaintiffs' oil has a quality which it ought not to

(a) 6 *Bing. N. C.* 212.

(b) 5 *Q. B.* 624.

have, namely, a reddish brown tinge. [*Wightman J.* You have not averred that the oil ought not to have such a quality.] It is for a jury to say whether the plaintiffs did not intend to represent it to the public as being without that quality. [*Blackburn J.* Is there any case where an action has been maintained for slander, written or verbal, of *goods*, unless where the slander is of the title to them, and special damage has resulted?] It has always been thought so clear that such actions would lie that the point has never been disputed. [*Cockburn C. J.* The answer to that is that not one of us recollects such an action in the course of his experience.]

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Milward, in reply, was stopped by the Court.

COCKBURN C. J. Our judgment must be for the defendant. I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained. For although none of us are familiar with such actions still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy.

But then comes the question: assuming that such an action would lie, does this declaration allege acts to support it? All that appears here is that, falsely and maliciously, the defendant has made representations and instituted a comparison between the plaintiffs' oil and that of some one else. But it may be that all the falsehood consists in this, that the defendant has alleged

1862. what is true of the plaintiffs' oil, and what is false of
Touss that of some other man, by attributing to that other
v. man's oil a character of superiority which it does not
Macrae. deserve. If the declaration had averred that the de-
fendant falsely represented the plaintiffs' oil to be an
oil of a brownish tinge, and of disagreeable odour,
when it was neither, and special damage resulted, I am
far from saying it would not be a libel. But it may be
that the falsehood here consists in a false representation
of the superior quality in respect of colour and odour of
the oil which the defendant advertised. This action
therefore cannot be maintained.

WIGHTMAN J. I am of the same opinion, although
I am not entirely without doubt. What is here complained
of was a comparison between the oil manufactured by
the plaintiffs and that sold by the defendant. There is
no statement in the alleged libel that the article sold or
manufactured by the plaintiffs is a bad article; it is only
said that it is inferior to that of some one else; and that
is consistent with the plaintiffs' article being in itself a
very good article. It is argued that special damage is
alleged in the declaration; but the special damage only
arises from comparison,—for the defendant merely said
that there was another person whose oil was of a superior
quality to that of the plaintiffs.

BLACKBURN J. What has been said by my Lord
Chief Justice and my brother *Wightman* are sufficient
for the decision of this case. My own impression is
that where there is a written depreciation of an article,
unless it is a slander actionable in itself, no allegation of
special damage will render it actionable, except in the

case of slander of title. But there may, as my Lord says, be cases where there is a scienter on the part of the defendant who has made statements doing mischief, and calculated to do it, in which an action would lie. But even if that were otherwise I agree that this action will not lie.

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Edward James asked for leave to amend.

COCKBURN C. J. You can bring another action, and perhaps get another professor to make a report in favor of *your* oil.

Judgment for the defendant.

BURLAND and another *against* The Local Board
of Health of KINGSTON-UPON-HULL.

Tuesday,
November 11th.

1. The Public Health Act, 1848, 11 & 12 Vict. c. 63., after providing for the constitution of the General Board of Health, sect. 4—7; and of Local Boards of Health, sect. 12—33; and empowering the latter to make special, sect. 86, and general district rates, sect. 87, enacts, by sect. 89. "The Local Board of Health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate &c." The *Kingston-upon-Hull Improvement Act*, 1854, 17 & 18 Vict. c. ci., incorporates, with certain exceptions, the 11 & 12 Vict. c. 63. By sect. 4 it constitutes the council of the borough of *Kingston-upon-Hull* the Local Board of Health for that place; and by sect. 131, "any rate made by the Local Board for any of the purposes of this Act may be made either wholly prospectively, or wholly retrospectively, or partly prospectively and partly retrospectively, and if for defraying liabilities incurred before the passing of this Act, or to be incurred within six months before the making of the rate or both: Provided always, that any rate to be laid for defraying liabilities incurred before the passing of this Act shall be laid within six months after the passing of this Act." The Local Board of Health for *Kingston-upon-Hull*, who, in order to defray the expenses on certain public works and improvements executed by them, had levied a private improvement rate, within the meaning of those Acts, upon certain occupiers, discovered, after the rate was paid, that it had been made and the money paid in error. After the expiration of six months from the time of payment, two of those occupiers sued the

Public Health Act, 11 & 12 Vict. c. 63.
Kingston-upon-Hull Improvement Act, 17 & 18 Vict. c. ci.
Charge on rate made by mistake.
Judgment.
Mandamus under Common Law Procedure Act, 17 & 18 Vict. c. 125.
s. 68.

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Board to remove back their money and dismissed judgment by default; and finding that the Board had not any funds available for the satisfaction of the judgment obtained a mandamus under The Common Law Procedure Act 1854, s. 16, to compel them to make a rate for the purpose. Held that as the six months limited by the statute had expired they were not entitled to it.

It was whether if the six months had not expired the judgment would have been a charge within those enactments.

THE declaration alleged that the defendants were The Local Board of Health of the town and borough of Kingston-upon-Hull, constituted according to the provisions of The Public Health Act, 1848, The Public Health Supplemental Act, 1851, No. 2, and The Kingston-upon-Hull Improvement Act, 1854, some or one of them: that in or about the year 1855 the defendants executed and completed certain public works and improvements at *Spring Bank*, within the town and borough of Kingston-upon-Hull, and within the limits of their jurisdiction and authority, the benefit of which public works and improvements had been enjoyed by the ratepayers and others, inhabitants of the said town and borough; that, in order to discharge and defray a portion of the costs, charges and expences of and attendant upon the said public works and improvements, the defendants, in or about the month of *October*, 1855, made and levied a private improvement rate within the meaning of The Public Health Act, 1848, upon divers persons, occupiers of premises at or near *Spring Bank*, and the plaintiffs, who then were occupiers of premises at *Spring Bank*, were rated, charged and assessed in the said private improvement rate at the sum of 46*l.* 5*s.* 6*d.*: that, some time in the year 1856, the plaintiffs paid to the defendants that sum: that, after such payment had been made, it was discovered that the defendants had made and levied the private improvement rate upon the plaintiffs and the said other persons in error, and that that portion of the costs, charges and expences which

the rate was made and levied to defray was properly chargeable upon the general rates leviable by the defendants as such Local Board of Health as aforesaid, and the plaintiffs had paid the said sum of 46*l.* 5*s.* 6*d.* to the defendants in error and mistake: that thereupon the plaintiffs applied to the defendants to repay and return to them the sum at which they were so erroneously rated, and which they had so paid in error and mistake; that the defendants, upon such application, admitted that they had received the rate of the plaintiffs in error and mistake, and under the supposition that they had due and legal power and authority to make the said private improvement rate, and that they were bound to repay and return the same to the plaintiffs, but the defendants alleged that they had no funds in their hands available for the purpose of repaying and returning the said rate, and that, inasmuch as a period of more than six months had elapsed, as the fact was, since the rate had been paid to them in error and mistake, and a like period had also elapsed, as the fact was, since the passing of The *Kingston-upon-Hull* Improvement Act, 1854, they were unable, in consequence of the provisions of The Public Health Act, 1848, section 89, and The *Kingston-upon-Hull* Improvement Act, 1854, section 131, to make and levy a rate for the purpose of defraying their said liability to the plaintiffs. It then stated that, on the 23d *January*, 1862, the plaintiffs commenced an action against the defendants in this Court to recover from them the said sum of 46*l.* 5*s.* 6*d.* so paid in error, and that, on the 19th *February* in that year, by the final judgment of this Court, they recovered the said sum of 46*l.* 5*s.* 6*d.* from and against the defendants: that the defendants had not, at the time of the recovery of the said judg-

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ment, nor ever since, had any funds, moneys or property of any kind whatsoever in their hands or possession applicable to or available for the discharge, satisfaction or payment of the said judgment debt: and, by reason of the said judgment debt being still due and owing to the plaintiffs, and of there being no funds, moneys or property in the hands or possession of the defendants applicable or available for the discharge, satisfaction or payment of the said judgment debt, nor any other means whereby the plaintiffs could have or obtain payment or satisfaction of it, except by the defendants making and levying a rate under the said Acts, or one of them, the plaintiffs became and were personally interested in the making, laying and levying a rate to pay and satisfy the said judgment debt within the meaning of The Common Law Procedure Act, 1854, to wit, to the amount of the said judgment debt and of the interest accruing due thereon; and the plaintiffs, being so interested, afterwards, and at a reasonable time before the commencement of this suit, demanded of and required the said Local Board of Health to make and levy a rate under the said Public Health Act, 1848, and The *Kingston-upon-Hull* Improvement Act, 1854, or one of them, for the payment and satisfaction of the said judgment debt and interest, but the Local Board wholly neglected and refused so to do, and the plaintiffs thereby, and by reason of the non-performance by them of their duty in that behalf, sustained damage to the amount of the said judgment debt and interest: and therefore the plaintiffs claimed a writ of mandamus commanding the defendants to make and levy a rate under The Public Health Act, 1848, and The *Kingston-upon-Hull* Improvement Act, 1854, or one of them, for the payment and satisfaction to the plaintiffs of the said judgment debt and interest.

Demurrer, and joinder in demurrer.

The Public Health Act, 1848, 11 & 12 *Vict. c. 63.*, after providing for the constitution of the General Board of Health, sect. 4—7, and of Local Boards of Health, sect. 12—33; and empowering the latter to make special, sect. 86, and general district rates, sect. 87, enacts as follows:—

Sect. 89. "The Local Board of Health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expences, or retrospectively in order to raise money for the payment of charges and expences which may have been incurred at any time within six months before the making of the rate; &c."

The *Kingston-upon-Hull* Improvement Act, 1854, 17 & 18 *Vict. c. ci.*, incorporates, with certain exceptions, the 11 & 12 *Vict. c. 63.* Sect. 4 constitutes the council of the borough of *Kingston-upon-Hull* the Local Board of Health for that place; and, by sect. 131, "Any rate made by the Local Board for any of the purposes of this Act may be made either wholly prospectively, or wholly retrospectively, or partly prospectively and partly retrospectively, and if for defraying liabilities incurred before the passing of this Act, or to be incurred within six months before the making of the rate or both: Provided always, that any rate to be laid for defraying liabilities incurred before the passing of this Act shall be laid within six months after the passing of this Act."

Croombe, in support of the demurrer.—Retrospective rates were unknown to the common law, and the only question therefore is whether they are allowable in such

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cases as the present by The Public Health Act, 1848, 11 & 12 *Vict. c. 43. s. 89.*, or The *Kingston-upon-Hull Improvement Act, 1854, 17 & 18 Vict. c. ci. s. 181.*, which contains similar provisions. The rate here sought to be imposed is not to enable the Local Board of Health to carry on works, but to enable them to repay a sum of money which they have received by mistake of law. [He was then stopped.]

Philbrick, contra.—Actions are maintainable against Local Boards of Health, under the 11 & 12 *Vict. c. 63.*, for wrongs which are not the subject of compensation under sect. 144; *The Southampton and Itchin Bridge Company v. The Southampton Local Board of Health (a)*. Every judgment against such a Board is a charge for which a rate may be made by them within that Act; *Ward v. Lowndes (b)*, *Reg. v. The Rotherham Local Board of Health (c)*; in the latter of which it was held that that could be done within six months from the time when execution might first have been issued. [*Wightman J.* Yes: but on a judgment for what? Suppose the expences had been for something clearly outside the statute, as, for instance, if the Board of Health had committed some legal wrong, and judgment were recovered against them, could they make a rate for that?] It will not be intended that public officers, especially gratuitous ones like a Local Board of Health, will commit a breach of duty, or exceed their functions. Besides, the judgment being regular, the grounds of it are not examinable; the cause of action on which it was founded having passed in *rem judicatam*. And, if they even were

(a) 8 *E. & B.* 801.

(b) 1 *E. & E.* 940; *aff. on error, Id.* 956.

(c) 8 *E. & B.* 906.

examinable, it appears here that the whole matter arose out of a bonâ fide mistake by all parties, not of law but of fact, and that the ratepayers have received the benefit of it. The 1 & 2 Vict. c. 110. s. 13. makes judgments charges in certain cases. [*Blackburn J.* The defendants are not the only parties concerned here. The practical result of granting a mandamus would be to affect the ratepayers, who would thereby become liable to reimburse this money.] The Local Board of Health is a representative body elected by the ratepayers. [*Blackburn J.* But the ratepayers could not dispute the judgment.] They might if it was obtained by collusion. [*Wightman J.* Could this mandamus have been granted in the original action? If not, why should it be granted now?] It could not have been granted then, because, at that time, the plaintiffs sued on the original consideration, which they cannot do now.

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Croombe having waived his right to reply,

COCKBURN C. J. Our judgment must be for the defendants, on the ground that this is not a charge within sect. 89 of The Public Health Act, 11 & 12 Vict. c. 63. If this action had been brought within the six months allowed by the statute, and judgment obtained afterwards, *Reg. v. The Rotherham Local Board of Health* (a) would apply; and I am disposed to think that then the charge would have been within sect. 89, although I will not lay that down. Suppose the money having been received in error by the defendants, under a supposed right, and applied to a regular purpose within the statute, afterwards became a debt due to the plaintiff,

(a) 8 E. & B. 906.

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and consequently a charge ; still, as a charge, if it was not sought to be enforced within six months, that would be too remote. Here it was not sought to be enforced for five years. I protest against the doctrine that, in order to get the benefit of any judgment, no matter what, the jurisdiction of this Court is to be invoked to give subsidiary aid by mandamus. The Legislature never intended that the ratepayers were to be made liable simply because the Local Board submitted to judgment. If so, they might be rendered liable after the lapse of twenty, thirty, or forty years, when the ratepayers had been altogether changed.

WIGHTMAN J. Unless a mandamus lay in the original action, it cannot, under the circumstances stated on the face of this declaration, be claimed now. The Local Board of Health, by suffering judgment by default would affect a different class of ratepayers.

BLACKBURN J. I am of the same opinion. On the face of the declaration here was a claim for money paid in 1856 to the Local Board of Health, and in 1862 an action was brought against them for money received, in which judgment went by default. Before I saw these dates, I thought it would be necessary for us to decide the point whether that ground of the judgment could be questioned. But it is not necessary to decide that here, for when it appears that the claim was more than six months after the time limited by the Act, it is plain, for the reasons assigned by the Lord Chief Justice and my brother *Wightman*, that the effect of a mandamus would be to throw the charge on a

different set of ratepayers. In *Reg. v. The Rotherham Local Board of Health* (a) Lord Campbell says:—"The Local Board may be compelled to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained. They may make a rate to pay for expences within six months after they become due; if an action is brought then, but judgment cannot be obtained till six months have elapsed, it cannot be that the creditor would be deprived of his remedy by the delay." I do not understand that to mean that any judgment obtained against parties like the present can be enforced at any time. If this were an application for a prerogative writ of mandamus, the granting of which is within the discretion of the Court, none would be granted; and, although this claim is under The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 68., which gives the right to claim a mandamus in an action, still we should be influenced by the practice under the prerogative writ.

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MELLOR J. When a party claims a mandamus in an action, he must shew circumstances that would induce the Court to issue the prerogative writ: and it would be a very strong thing to say that we should issue a prerogative writ of mandamus under circumstances like the present. *Reg. v. The Rotherham Local Board of Health* (a) is quite distinguishable; certainly in its facts, but I think also in the doctrine it lays down.

Judgment for the defendants.

(a) 8 E. & B. 906. 913.

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Tuesday,
November 11th.

EDWARDS and another *against* SCARSBROOK.

Bankruptcy.
12 & 13 *Vict.*
c. 106. s. 133.
24 & 25 *Vict.*
c. 134. s. 72.
Execution.
Seizure.
Sale.

Where an act of bankruptcy, under 24 & 25 *Vict.* c. 134. s. 72, takes place after an execution issued against the party and a seizure of his goods, but before a sale takes place under it, the execution is not put an end to by 12 & 13 *Vict.* c. 106. s. 133.

SPECIAL case under The Common Law Procedure Act, 1860, 23 & 24 *Vict.* c. 126. s. 15.

The plaintiffs were the creditors' assignee and official assignee respectively of one *Edward Charles Peagam*, a bankrupt. On the 11th *July*, 1861, judgment was obtained by the defendant in an action brought by her against *Peagam* on a bond debt. On the 21st *November*, 1861, a writ of fieri facias was issued out of this Court against him at the suit of the defendant on that judgment, and endorsed to levy 82*l.* 11*s.*, besides sheriff's poundage, officers' fees, costs of levying and all other legal incidental expences, and 1*l.* 3*s.* 8*d.* for costs of execution &c., and was levied by the sheriff of *Oxfordshire* on his goods at *Bicester*. On the 25th *November*, 1861, *Peagam* filed a declaration of insolvency in the Court of Bankruptcy, notice of which filing was, after ten o'clock on the night of the same day, served on the sheriff's man then in possession of the goods under the writ, and on the auctioneer employed by the sheriff; and on the 26th *November*, 1861, a similar notice was served on the defendant shortly before the time of the sale. On the 26th *November*, 1861, the goods were sold by the sheriff under the writ by public auction, duly advertised. On the 29th *November*, the bankrupt

filed his petition in bankruptcy, and his affidavit of the truth thereof, and was adjudged a bankrupt. Copies of the petition and affidavit of the bankrupt, and adjudication, and of the declaration of insolvency, accompanied the case; and were all headed "The Bankruptcy Act, 1861," and purported to be "In the Court of Bankruptcy, London." The bankrupt was, at the times above mentioned, a non-trader. By an order of *Mellor J.*, made on the 3d *January*, 1862, in the action at the suit of the defendant against *Peagam*, upon an interpleader summons taken out by the sheriff, it was ordered, amongst other things, that the proceeds of the sale, after deducting the expences thereof, be paid into Court in this cause, and abide further order therein. And the order reserved certain questions of costs. In pursuance of that order, the sum of 97*l.* 4*s.* 11*d.* was paid by the sheriff into Court, which was not more than enough to satisfy the said sum of 82*l.* 11*s.* and the other matters indorsed on the writ.

The question for the opinion of the Court was, Whether the goods were, at the time of the sale, the property of the plaintiffs or of one of them, as against the defendant.

Lush (*C. E. Pollock* with him), for the plaintiffs.—The act of bankruptcy in this case took place under the 24 & 25 *Vict. c. 134. s. 72.*, which re-enacts the 5 & 6 *Vict. c. 122. s. 22.*, extending the provisions of the bankrupt law to non-traders. The execution having been commenced by seizure without being perfected by sale before the act of bankruptcy, is not rendered valid by 12 & 13 *Vict. c. 106. ss. 133, 134.* The former of these sections enacts, "That all payments really and bonâ fide made by any bankrupt, or by any person on his behalf, before

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1862. date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and bonâ fide made to any bankrupt, before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt bonâ fide made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit actionem or Judge's

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order obtained by consent given by any bankrupt by way of fraudulent preference." And the latter: "That no creditor having security for his debt, or having made any attachment in *London* or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon or any mortgage of or lien upon any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy: Provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a Judge's order declared to be null and void by any provision of this Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent." These sections do not apply except where the execution creditor had no notice of a prior act of bankruptcy. The previous statutes differ in that respect. 6 G. 4. c. 16. s. 81. enacts, "All conveyances by, and all contracts and other dealings and transactions by and with any bankrupt bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed;

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1862. Provided the person or persons so dealing with such
EDWARDS bankrupt, or at whose suit or on whose account such
v. execution or attachment shall have issued, had not at
SCARBROOK. the time of such conveyance, contract, dealing or trans-
action, or at the time of executing or levying such execu-
tion or attachment, notice of any prior act of bank-
ruptcy by him committed: Provided also, that where a
commission has been superseded, if any other commis-
sion shall issue against any person or persons comprised
in such first commission, within two calendar months
next after it shall have been superseded, no such con-
veyance, contract, dealing or transaction, execution or
attachment, shall be valid, unless made, entered into,
executed or levied more than two calendar months before
the issuing of the first commission."

And by 2 & 3 *Vict. c. 29. s. 1.*: "All contracts, deal-
ings, and transactions by and with any bankrupt really
and bonâ fide made and entered into before the date
and issuing of the fiat against him, and all executions
and attachments against the lands and tenements, or
goods and chattels of such bankrupt, bonâ fide executed
or levied before the date and issuing of the fiat, shall
be deemed to be valid, notwithstanding any prior act of
bankruptcy by such bankrupt committed; provided the
person or persons so dealing with such bankrupt, or at
whose suit or on whose account such execution or
attachment shall have issued, had not at the time of
such contract, dealing, or transaction, or at the time of
executing or levying such execution or attachment,
notice of any prior act of bankruptcy by him committed;
provided also, that nothing herein contained shall be
deemed or taken to give validity to any payment made
by any bankrupt, being a fraudulent preference of any

creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

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Stat. 12 & 13 *Vict. c.* 106. repeals these statutes, and sect. 133 omits the words "at the time of executing or levying such execution or attachment," and requires "sale" as well as "seizure" to protect the creditor.

Sect. 133 must be read as engrafted on sect. 184; and, taken together, they shew that the object of the statute was to invalidate all executions not completed. The term "prior act of bankruptcy," in sect. 133, means prior to contracts, dealings, &c. with the bankrupt. Under the old law, a sheriff was liable for taking goods in execution if an act of bankruptcy was afterwards committed, *Hooper v. Lane* (a); and the object of the statute was to lessen the immunity given by previous ones to the execution creditor. [He cited *Hutton v. Cooper* (b).]

Mellish, who appeared for the defendant, was stopped by the Court.

COCKBURN C. J. This case is clear. It turns on sect. 133 of stat. 12 & 13 *Vict. c.* 106. I think there can be no doubt that the law prior to that statute was thus. Originally execution was not annihilated by an act of bankruptcy posterior to its date, though prior to a sale under it; but an execution, though *bonâ fide*, was annihilated by an act of bankruptcy prior to the issuing of the writ. Then came certain statutes which gave protection to execution creditors against prior acts of

(a) 6 *H. L. Cas.* 443.

(b) 6 *Exch.* 159.

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bankruptcy. Stat. 6 *G.* 4. *c.* 16. *s.* 81. gave protection to executions bonâ fide executed or levied which were prior, by two calendar months, to the issuing of the commission. Next came stat. 2 & 3 *Vict. c.* 29., bringing the protection down to the time of execution ; that Act says that no execution shall be rendered invalid which has been bonâ fide executed or levied before the issuing of the fiat. Then the subsequent Act, 12 & 13 *Vict. c.* 106. *s.* 133., on which Mr. *Lush* relies, introduces a further condition, that the issuing of the execution shall be followed "by seizure and sale." That still refers to an act of bankruptcy prior to the execution, and leaves the law as to acts of bankruptcy posterior to the execution as it was before. The question is therefore totally untouched by stat. 12 & 13 *Vict. c.* 106., and as Mr. *Lush*, in order to invalidate this execution, is compelled to rest his argument on the construction of a section of that statute, and has failed, there is an end of the case.

WIGHTMAN J. I agree in the construction that has been put by the Lord Chief Justice on the statute 12 & 13 *Vict. c.* 106. *s.* 133.

BLACKBURN J. I am of the same opinion. There can be no doubt that the true construction of sect. 133 of stat. 12 & 13 *Vict. c.* 106. is as the Lord Chief Justice says ; *i. e.*, where there is a prior act of bankruptcy the execution shall be protected, provided there was no notice of the act of bankruptcy, which shall have the same effect as acts of bankruptcy had previously. But then they are not to have *more* effect there than they previously had : there are no words for that purpose. The effect of an act of bankruptcy intervening between the

seizure and sale I do not remember, but my brothers state it, and Mr. *Lush* admits it.

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MELLOR J. All these statutes endeavour to place some limitation on the effect of the decision of the Exch. Chamber in *Balme v. Hutton* (a), the principle of which was affirmed by the House of Lords in *Garland v. Carlisle* (b). They all require an act of bankruptcy before the execution, and not an act of bankruptcy intervening between the execution and sale.

Judgment for the defendant.

(a) 9 Bing. 471; 3 Moo. & S. 1.

(b) 4 Cl. & F. 693.

MURRAY and another *against* ARNOLD.

Tuesday,
November 25th.

1. After issue had been joined and notice of trial given in an action on a bill of exchange, the defendant obtained a Judge's order for a commission to examine witnesses abroad, on payment into Court of a portion of the plaintiff's claim. The money was paid in accordingly, but the commission was not acted on. The defendant having subsequently become bankrupt, and his assignees appointed, the plaintiff obtained leave to proceed with the action, which was tried, and the defendant not appearing, a verdict was given for the plaintiff: held, that the plaintiff was entitled to the money which had been paid into Court, and that he was not deprived of this right by The Bankrupt Act, 12 & 13 Vict. c. 106. s. 184.

2. *Seemle*, that the plaintiff was not in the position of a creditor "having security for his debt" within that section: dubitante *Blackburn J.*

Money paid
into Court.
Bankruptcy.
12 & 13 Vict.
c. 106. s. 184.
Security for
debt.
Lien.

THIS was an action by the drawers against the acceptor of a bill of exchange for 151*l.* 7*s.* 6*d.* On the 14th April, 1862, after notice of trial had been given, the defendant obtained a Judge's order, directing that, on payment into Court of 100*l.*, a commission should issue for the examination of witnesses at *Bombay*,

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and in the meantime all proceedings should be stayed. The money was paid into Court accordingly, but the commission was not acted on. On the 24th *July*, the defendant was adjudicated bankrupt, and assignees were appointed, but he never surrendered. On the 28th *July*, the plaintiffs obtained leave to proceed with the action, which was tried at the Summer Assizes at *Liverpool*, and, the defendant not appearing, a verdict was given for the plaintiffs.

Under these circumstances, summonses having been taken out by the plaintiffs and by the creditors' assignee to have the money paid out of Court to them respectively, both came on together before *Blackburn J.*, on 14th *November*; who, on the first summons, made an order that the sum paid into Court be paid out of Court to the plaintiffs' agent in a week, unless in the meantime a rule were obtained to set aside that order, the assignee to have leave to go to the Court. The second summons was indorsed "No order, with leave to go to the Court."

R. E. Turner, in this Term (*Nov. 21st*), obtained a rule to set aside the order, and that the money be paid out to the assignee.

Charles Russell shewed cause.—The plaintiffs are entitled to have this money paid out to them, they having a lien upon it within the exception in stat. 12 & 13 *Vict. c. 106. s. 184.*, which enacts, "No creditor having security for his debt, or having made any attachment in *London* or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served

and levied by seizure and sale upon or any mortgage of or lien upon any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy: provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a Judge's order declared to be null and void by any provision of this Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent."

Holmes v. Tutton, in this Court (*a*), and *Tilbury v. Brown*, before *Crompton J.* in the Bail Court (*b*), may be relied on by the other side; but those cases only shew that an order under the garnishee clauses of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.*, is not equivalent to a lien under this section. Here was what was equivalent to payment, namely, the depositing the money in Court, which is the same as handing it over to a stakeholder. *Stead v. Spiegelberg* (*c*) seems an authority against the defendant. At the time when the original order was made, the plaintiffs were entitled to try the cause; and that order compelled them to forego their right in consideration of the defendant paying the money into Court. [*Wightman J.* *Ferrall v. Alexander* (*d*) seems an authority that money paid into Court, under stat. 7 & 8 *G. 4. c. 71. s. 2.*, to abide the event of a suit, is not payment to a creditor within the protection of stat. 6 *G. 4. c. 16. s. 82.*]

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(*a*) 5 *E. & B.* 65.(*c*) 10 *W. R.* 46.(*b*) 30 *L. J. Q. B.* 46.(*d*) 1 *Dowl. P. C.* 132.

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Mellish and R. E. Turner, in support of the rule.—
On the true construction of this section the assignees of the defendant are entitled to the money in Court. At the time of the defendant's bankruptcy the action was undecided, but this money was specifically appropriated to abide the event, the Court being a mere stakeholder or trustee. Under such circumstances it cannot be said that the plaintiffs were in the position of creditors having "security" for their debt. [*Blackburn J.* I think *Ferrall v. Alexander (a)* is rather against you.] That case was decided under the previous Bankrupt Act, 6 G. 4. c. 16. s. 108., the language of which differs from stat. 12 & 13 Vict. c. 106. s. 184., and enacts, "No creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy: Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default; confession or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." Here the money was in Court to abide an event not decided when the adjudication of bankruptcy took place.

But whether the plaintiffs had "a lien upon any part of the property" of the bankrupt within the exception in

(a) 1 Dowl. P. C. 132.

12 & 13 *Vict. c.* 106. *s.* 184. is a more difficult question. If "lien" is to be construed as synonymous with "security," it amounts to nothing. [*Blackburn J.* Is that quite certain? Attachments, executions, &c., mentioned in the section, are securities.] "Lien" means *legal* lien.

Although *Holmes v. Tutton* (*a*) is not in point as to its facts, the judgment is strongly in favour of the defendant. Lord *Campbell* there says, p. 79, "It was suggested that the word 'lien' and the word 'bind' really express the same idea, and that, though at law, in strictness, the word 'lien' denotes a possession by the party claiming the lien, yet that an equitable lien may well be said to exist on a debt, and that the service of the order operates as an equitable assignment or conveyance of the debt. As the creditor seems to us clearly to have a security within sect. 184, it should be made out affirmatively that the present is the case of a lien, within the meaning of the clause. We are not satisfied that *it is * * **" Pp. 80, 81: "In the case of a mortgage or equitable assignment or lien there is a property in the party; and it is to such cases we think that the exception applies, and not to cases where a right is given to realize property seized under the new machinery introduced by the recent Act for enforcing a judgment, which, though not requiring the intervention of the sheriff, is in truth a mere statutory compulsory execution. We think that the exception as to mortgages and liens in sect. 184 of The Bankrupt Act referred to cases in the nature of mortgages or liens by some conveyance, or contract, or course of dealing, which is the same as contract, where some property is in the thing passed, and, at all events, that the word 'lien' referred to something different

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from the binding of the goods by delivery of the writ to the sheriff, or by the seizure of bills or notes giving a security under stat. 1 & 2 *Vict. c. 110. s. 12.*, or by the debt being bound by the service of the order under the recent Procedure Act." In the present case there was nothing in the nature of a contract between the parties. [*Cockburn C. J.* Suppose the money had been paid into Court as security for costs?] In that case there could have been no debt. [*Wightman J.* Suppose the action had been for a tort?] Then the case would not have come within the section. *Stead v. Spiegelberg (a)* is inapplicable. [*Wightman J.* Have you seen the case of *Hichens and others v. Congreve (b)*?] That case was different. There *Shadwell V. C.* says, p. 429, "With respect to the defendant *Dunston*, it was said that it was only a case of assumpsit, and that the plaintiffs had no right to what has been paid into Court, in respect of the share of the 15,000*l.* which he received. I admit that, if there had been no order made for paying the money into Court, the plaintiffs would now have established, for the first time, a demand against him; and the result of this suit would have been merely to give, to the plaintiffs, a right to prove against *Dunston's* estate. But when, in the progress of the cause, and during the solvency of *Dunston*, the Court has ordered the money, which is the subject of dispute, to be paid into Court, my opinion is that the Court cannot hold that the money was paid in, by way of security merely, and is now to be returned, and that the plaintiffs have only a right to prove against *Dunston's* estate: but I think that the plaintiffs are entitled to take the fund as the specific thing to which they are entitled."

(a) 10 *W. R.* 46.(b) 4 *Sim.* 420.

COCKBURN C. J. This rule must be discharged. The amount in question is a sum of money paid into Court under a Judge's order as the consideration for which the defendant obtained leave to issue a commission to take evidence abroad, the sum being to abide the event of the suit. The suit has come to its termination by a verdict for the plaintiffs. The assignees of the defendant, who in the meantime became bankrupt, claim under sect. 184 of the 12 & 13 *Vict. c.* 106., which provides that creditors having security for their debts against a person who becomes bankrupt, shall, upon such security, take only their share or rateable proportion of the bankrupt's estate. Now if the expression "security for his debt" applies here, the assignees are entitled to the money, and the plaintiffs can only have a rateable proportion of their debt.

I think sect. 184 does not apply here. What was meant there was, that a creditor having security for the recognised debt of a man who has become bankrupt shall not avail himself of it to the injury of that man's other creditors. Here was no debt existing and ascertained within the meaning of the section, at least none for which this money was paid in as security. It was paid in, not for an admitted debt, for that was in course of litigation, but to abide the event of the suit, and as a security against the eventual judgment in it; and until then there was no recognised *debt* between the parties. I arrive at that conclusion thus. Suppose instead of recovering the full amount of their claim, the plaintiffs recovered only a small portion, but their costs were sufficient to overtop the sum paid into Court, there the amount paid in would be a security not merely for the amount recovered as *debt*, but as *costs*. That satisfies me that this is not payment as security

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for a debt, but security for the eventual judgment of the Court at the close of the action, which would include both debt and costs.

This is clearly distinguishable from the garnishee cases, where there is a clear ascertained debt, for which the creditor has got his judgment, and he arrests in the hands of the garnishee a debt due from the judgment creditor.

I do not think the term "security" in the statute was intended to apply to such a case as the present, and it would not be consistent with what is fair and right between these parties if we should hold it did, unless there were something in the statute compelling us to come to that conclusion. But it is enough to say that sect. 184 does not apply.

WIGHTMAN J. I am of the same opinion. This is not a security for a debt within 12 & 13 *Vict. c. 106. s. 184*. This money, which was paid into Court under a Judge's order, was not paid in in the nature of a security for an ascertained *debt*, but to abide the *event of the suit*; and a Judge's order might have been obtained much in the same form as the present if the action had been, not to recover money in the nature of a debt, but for general damages. The statute meant to apply to cases where there is a security for an ascertained debt: this case is very different; for the money paid in here would include within it the costs, however small the sum due to the plaintiffs might be. The case differs very much from that of a garnishee.

BLACKBURN J. Money which before his bankruptcy belonged to the bankrupt was here paid into Court by him to abide the event of the suit, otherwise the Judge

would not have consented to make the original order. While the defendant was still *sui juris*, he paid the money into Court, and it was held by the officer of the Court on those terms. The money was clogged with a trust, and the plaintiffs have an equitable right to it on compliance with the terms on which it was paid in. This arrangement would, I think, be binding on the bankrupt who paid in the money, and also on his assignees, if there were not a statute enacting that it should not be binding on them. That brings us to sect. 184. I am far from saying that I should quite agree with my Lord and my brother *Wightman* in holding that this case is not that of a "creditor having security for his debt" within the meaning of the statute 12 & 13 *Vict. c. 106. s. 184*. But the important question is, was this a "lien" within the meaning of the exception in that section? I agree with all that is said in the judgment in *Holmes v. Tutton (a)*. There it is pointed out that where a sheriff has seized goods, or there is a garnishee order or an attachment, it is to be considered merely as binding the goods. But the money here, when paid in, was a lien by contract within the meaning of that case, and, if so, is within the exception in sect. 184.

Perhaps I might agree in giving judgment for the plaintiffs on the other ground also; but I prefer resting my judgment on this.

MELLOR J. This money was specifically appropriated by the bankrupt before his bankruptcy in consideration of what he supposed to be an advantage, *i. e.*, a commission to examine witnesses. The Judge imposed a condition that he should pay money into Court to be handed to the plaintiffs if the suit ended favourably for them.

(a) 5 *E. & B.* 65.

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This therefore is not a security within the meaning of this statute, but is either in the nature of a lien, or a specific appropriation of money dependent on the event of the suit.

C. Russell applied for costs.

BLACKBURN J. I encouraged this appeal.

COCKBURN C. J. It was a fair case for discussion.

Rule discharged, without costs.

Monday,
November 24th.

Ex parte COOMBS, a Bankrupt.

Bankruptcy.
24 & 25 Vict.
c. 134.
Jurisdiction
of County
Courts.
Petition in
forma pau-
peris.

1. After the passing of the statute 24 & 25 Vict. c. 134., to amend the law of bankruptcy and insolvency, a person resident within the jurisdiction of the B. District Court of Bankruptcy, being in gaol at C. out of that district, petitioned in forma pauperis under sect. 98 for adjudication of bankruptcy against himself, his debts exceeding 300*l*. The Judge of the County Court at C. (called for distinction the *Gaol* County Court) adjudicated him bankrupt, and made an order under sect. 94 to transfer the proceedings to the County Court of S., the district in which he had resided for six calendar months before filing his petition (called for distinction the *Home* County Court.) The Judge of that Court having refused to adjudicate, as the debts of the bankrupt exceeded 300*l*. : held that he was right, as that Court had no jurisdiction.

2. *Quere*, whether the petition ought to have been presented to the District Court of Bankruptcy at B. : and, if not, what proceedings ought to have been taken after the adjudication in bankruptcy by the *Gaol* County Court?

H. *S. GIFFARD* obtained a rule in this Term (*Nov.*

4th), calling on the judge of the County Court of *Glamorganshire*, holden at *Swansea*, to shew cause why he should not hear and adjudicate upon the case of *Charles William Coombs* in the matter of his bankruptcy.

The proceedings in the present case took place after

the passing of stat. 24 & 25 *Vict. c. 134.*, to amend the law of bankruptcy and insolvency. *Charles William Coombs* resided within the jurisdiction of the *Bristol District Court of Bankruptcy*; but, on the 20th *May*, 1862, being in gaol at *Cardiff*, out of that district, he filed a petition for adjudication of bankruptcy against himself; his debts exceeding 300*L*. This petition was filed in formâ pauperis, the petitioner having previously made affidavit that he had not the means of paying the fees and expences usually payable in respect of such a petition. On this petition he was brought before the *County Court of Glamorganshire*, holden at *Cardiff*, the judge of which, on the 23d *May*, adjudicated him bankrupt, and made an order under sect. 94 of the statute that the proceedings should be transferred to the *County Court of Glamorganshire*, holden at *Swansea*, being the *County Court* of the district in which the petitioner had resided for six months next before filing his petition. On the 7th *August*, 1862, the bankrupt was taken before that judge, who refused to adjudicate, on the ground that he had no jurisdiction as the debts of the bankrupt exceeded 300*L*.

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The proceedings were accordingly returned to the *County Court* at *Cardiff*, but the judge refused either to deal with the case himself, or annul the adjudication, or grant protection to the bankrupt.

It appeared that for the purposes of distinction the expression "*Gaol County Court*" is used to designate the *County Court* of the district in which the debtor is confined, and "*Home County Court*" to designate that of the district which the debtor, if not in custody, would be required to petition.

Horace Lloyd shewed cause.—The question in this

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case depends on the construction of several sections in stat. 24 & 25 *Vict. c. 134.*, to amend the law of bankruptcy and insolvency, on which the County Court judges for *Cardiff* and *Swansea*, as well as some other County Court judges, differ in opinion.

In that statute, under the heading "As to petitions for adjudication of bankruptcy and the proceedings thereupon," come the 86th, 88th and 94th sections.

Sect. 86 enacts. "Any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy, without any previous declaration of insolvency by such debtor."

Sect. 88. "Every petition for adjudication of bankruptcy, except as hereinafter provided, shall be filed and prosecuted in the Court of bankruptcy within the district of which such debtor shall have resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months &c."

Sect. 94. "Where a debtor petitions for adjudication against himself, and knows or verily believes the debts justly due and proveable under the bankruptcy to amount in the whole to a sum not exceeding 300*l.*, such fact shall be stated on oath, and if he be resident within the metropolitan district as herein defined, he shall file his petition in the *London Court of Bankruptcy*, and where such debts shall not exceed 300*l.*, and the debtor shall not be resident in the metropolitan district, he shall file his petition in the County Court for the district in which he shall have resided for the six months next before the filing of his petition, or for the longest period during those six months, unless he is in custody, and then in the County Court for the district in which he is in custody; but such Court, if it make adjudication,

shall transfer the proceedings to the County Court in which the debtor, if not in custody, would have been required to petition."

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The next heading, including sects. 98, 99, 100, 101, is entitled "As to adjudication of bankruptcy against pauper and other prisoners for debt."

Sect. 98. "If any debtor, whether trader or not, now being or who shall be imprisoned for any debt or demand, shall through poverty be unable to petition the proper Court for an adjudication of bankruptcy against himself, he shall be at liberty to petition in formâ pauperis, upon making an affidavit that he has not the means of paying the fees and expences usually payable in respect of a petition by a debtor for an adjudication of bankruptcy. Such affidavit may be sworn before the gaoler of the prison where such debtor is confined, and such gaoler is hereby empowered and required to take such affidavit, and swear the deponent thereto, without fee or reward."

Sect. 99. "Every person so petitioning in formâ pauperis as aforesaid shall, if not previously discharged by a registrar, be brought up to the County Court of the district at its next sitting after the presentation of such petition, and shall be examined by the Court touching his estate and effects, debts, dealings, and transactions; and if the Court shall be satisfied with such examination it shall make an order of adjudication of bankruptcy against the petitioner, and, if it shall think fit, grant an order of protection to the petitioner."

Sect. 100 provides that the gaoler of every prison in *England* and *Wales* shall make a monthly return of the persons in his custody for debt; and sect. 101, that the Commissioner or County Court judge, as the case may be, shall in every case, on receiving such return, make

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an order that a registrar of the Court of Bankruptcy, or of the County Court, shall attend at the gaol of the district to examine every prisoner, with power to make orders of adjudication in bankruptcy, and to grant protection, and certify the particulars to the Court.

The adjudication of bankruptcy here was properly made in the *Gaol* County Court, but that Court had no jurisdiction to transfer the matter to any other. Sect. 94 is the only part of the Act which speaks of the transfer of proceedings, and it applies solely to cases where the debts of the bankrupt are less than 300*l*. Besides, if the matter were to be transferred at all, it ought to have been transferred, not to the *Home* County Court, but to the Court which would have dealt with the case if the proceedings had been in the ordinary way, namely, to the District Court of Bankruptcy, sect. 88; or to the County Court of the district, if the debts of the bankrupt did not amount to 300*l*. Sects. 98, 99, relative to bankrupts petitioning in formâ pauperis, give no directions as to the Court in which the proceedings are to be carried on. Sects. 100, 101, relate to proceedings *in invit*os.

H. S. Giffard, in support of the rule.—The judge of the *Home* County Court is bound to carry these proceedings to their termination. Sect. 94 is a limitation on the enactments in sects. 98, 99, 100, 101, and must be read in connexion with them. When the *registrar* finds a pauper in gaol who has petitioned to be made bankrupt, he may adjudicate him to be so, and also indicate the Court in which the proceedings are to be carried out.

COCKBURN C. J. This rule must be discharged. The

question we have to determine is, whether the judge of the County Court of *Glamorganshire*, holden at *Swansea*, was called upon under the circumstances to adjudicate in the matter of *C. W. Coombs*, a bankrupt;—to grant him protection, and dispose of the whole affair as ought to be done in cases of bankruptcy. I am clearly of opinion that that judge was right in declining the jurisdiction he was called on to exercise.

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The question turns on the 94th section of stat. 24 & 25 *Vict. c. 134.*, taken in combination with the 98th and 99th sections. It is impossible to read the 94th section without seeing that it applies solely to cases where the debts of the bankrupt do not exceed 300*l.* And whereas by sect. 88 the jurisdiction in bankruptcy is primarily in the Court of Bankruptcy for the district in which the debtor shall have resided or carried on business for the six months next immediately preceding the time of filing the petition; by sect. 94 a jurisdiction over prisoners in custody is given to all County Courts. Where the debts do not exceed 300*l.*, then what is compendiously called the *Gaol* County Court acquires jurisdiction so far as to adjudicate that the party is a bankrupt, but it is directed to transfer the proceedings to what is, with equal advantage, called the *Home* County Court. It is clear, therefore, that if this petition were under sect. 94, and not under sects. 98 and 99, the proceedings would be properly transferred. But when we come to the question whether there can be a transfer under sect. 94 when the proceedings are under sects. 98 and 99, a totally different consideration presents itself. Sects. 98 and 99 relate to persons in the condition of paupers, but whose debts are not to be limited to 300*l.*, the amount specified in sect. 94, and

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may be below or above that sum. How then can it be said that the *Gaol* County Court (to which I assume for the sake of argument the right to petition is given to the bankrupt) has any power to adjudicate in such a case that the petitioner is a bankrupt, and grant him protection,—that the Court acquires the same powers, or is under the same obligations as in the former case? May we incorporate sect. 94 into sects. 98, 99? It would be legislating anew, rather than giving an exposition of those sections, if we were to introduce into sects. 98, 99, a condition which only applies to sect. 94. And there is this remarkable distinction between sect. 94 and the provisions relating to pauper bankrupts: in the one the *Gaol* County Court has power to adjudicate bankrupt only, whereas under sects. 98, 99 it can also grant protection. When we come to see what is to be done after protection, and what is to be done after presenting a petition, very serious difficulties present themselves. The Act does not point out to what Court the petition is to be presented. Properly the District Court of Bankruptcy has *prima facie* jurisdiction over all matters in bankruptcy, and then there is no provision for transfer to the *Gaol* County Court before which the bankrupt is brought up. I do not wish to throw any doubt on the regularity of the proceedings here in presenting this petition to the *Gaol* County Court instead of the District Bankruptcy Court,—I do not express an opinion one way or the other. This man has had the adjudication of the *Gaol* County Court that he is a bankrupt; and the question as to whether the District Court of Bankruptcy is the proper Court to determine and adjudicate on whatever yet remains to be done is a most serious one.

On the one hand it may be said, sect. 99 in its terms only gives jurisdiction to adjudicate bankrupt and grant protection,—that is all the authority the Legislature has given to the judge of the *Gaol* County Court. On the other hand it may be contended that, as the petition is to be in that Court, the Legislature having given it power to grant protection, that Court has full power to conduct the matter to its termination. On this question we can only speculate, as the Legislature has not pronounced on it: we should be only groping our way in the dark, and it is therefore better to abstain from giving any extrajudicial opinion. It is enough for us to say we cannot make the present rule absolute.

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WIGHTMAN J. I am entirely of the same opinion.

BLACKBURN J. I am of the same opinion. The only question we are called on to decide judicially is, whether the County Court of *Swansea*—the *Home* County Court—is bound under the circumstances to proceed with this case. I agree with my Lord and my brother *Wightman*, that there is no duty cast on that Court by statute to proceed when the debts exceed 800*l.*, and the petition is in formâ pauperis.

Another question of great importance and difficulty has been argued here—to which Court ought the bankrupt to have presented his petition? It is clear that the place of adjudication of bankruptcy is the place where the petitioner is, namely, the *Gaol* County Court; but what Court is to proceed afterwards, and in what manner is it to be done? All these questions have been raised, but it is not material to decide them. Mr. *Lloyd* made an impression on me that the petition ought

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to be in the District Court of Bankruptcy ; but at present I only say, in accordance with my Lord, that the sections before us are not clear, and consequently that there should be a legislative declaration to settle the law for the future. The question may arise in many ways. A man may be sued for debts, in which event a Court of civil judicature may have to declare whether the proceedings in his bankruptcy were taken in a wrong Court, and consequently void. Or, a man may be condemned to penal servitude for concealing his effects, in which case it may be necessary for a Court of criminal judicature to determine whether the proceedings in bankruptcy were in the right Court.

MELLOR J. concurred.

Rule discharged.

TRIMMER v. WALSH and another (*Nov. 14th*),
DRESSER v. BOSANQUET, Treasurer, &c. (*Nov. 18th*), and
TOMS v. WILSON and another (*Nov. 22d*),
will be reported with the proceedings in the Exchequer-
Chamber in those respective cases.

MEMORANDUM.

John Robert Kenyon, Esq., of the *Middle Temple*,
Thomas Southgate, Esq., of *Gray's Inn*, and *Arthur Hobhouse*, Esq., of *Lincoln's Inn*, were appointed of Her Majesty's Counsel learned in the law.

END OF MICHAELMAS TERM.

BRIGHTY *against* NORTON.

*Wednesday,
November 26th.*

By deed made on the 30th *January*, 1860, in consideration of 410*l.* lent to the plaintiff by the defendant, the plaintiff assigned certain household furniture, farming stock, and goods and chattels and future personal estate and effects to the plaintiff, subject to a proviso for redemption if the plaintiff should pay to the defendant 410*l.* "on the 30th *January*, 1870, or at such earlier day or time as the defendant, or his attorney or agent, should appoint for payment thereof, by notice in writing, sent by post or delivered to or left at the house or last known place of abode" of the plaintiff; with a power of immediate entry and sale on default of payment contrary to the proviso and the true intent and meaning of the deed; and there was a proviso that until default the plaintiff should hold possession and use the goods, chattels and effects, without any hindrance or disturbance by the defendant. The defendant, at noon of the 20th *February*, 1860, gave the plaintiff notice to pay the money to him at half past twelve of the same day, and at that time, the plaintiff not paying the money, seized the plaintiff's goods, and afterwards sold them: Held, that the notice under the proviso must be reasonable, and that the notice given by the defendant was not given in a reasonable time.

*Bill of sale.
Day of pay-
ment.
Reasonable
notice.*

THE declaration stated that, on the 30th *January*, 1860, by a deed then made between the plaintiff of the one part and the defendant of the other part, purporting to be in consideration of the sum of 410*l.* lent and advanced to the plaintiff by the defendant, the plaintiff assigned and transferred unto the defendant certain household furniture, plate, linen, china, farming stock, both live and dead, implements of husbandry, horses, carts, carriages and other the goods and chattels of the plaintiff, and the personal estate and effects which the plaintiff should thereafter become possessed of or which should at any time thereafter remain and be brought in, upon or about the plaintiff's then present or any

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future dwelling house and premises; to hold the same household furniture &c. unto the defendant as his own proper goods, chattels and effects, subject to a proviso for redemption that if the plaintiff should pay or cause to be paid unto the defendant the sum of 410*l.* on the 30th *January*, 1870, or at such earlier day or time as the defendant, or his attorney or agent, should appoint for payment thereof, by notice in writing, sent by post or delivered to or left at the house or last known place of abode in *England* of the plaintiff, then and in that case the said deed should cease and be void: Provided that if default should be made in payment of the said sum, or any part thereof, contrary to the aforesaid proviso, and the true intent and meaning of the said deed, then, and immediately thereupon, it should be lawful for the defendant or his agent, forthwith, or at any time or times thereafter, to enter into and upon any farms, lands, dwelling houses and premises of the plaintiff, and to take possession of the said goods, chattels and effects (with force, if necessary, as by breaking the house doors, or any other doors, locks or gates of any buildings or premises in which any of the said personal estate and effects thereby assigned might be deposited or kept), and to sell the same, or any part or parts thereof, by public auction or private contract, and to receive the money arising from such sale or sales, and, after payment thereof of all costs, charges and expenses incident to the preparation and completion of the said deed, and the execution of the trusts thereof, in the first place to retain and pay himself the said sum of money thereby secured, or intended so to be, or such part thereof as should remain unpaid, and to pay the surplus (if any) of the proceeds of such sale to the plaintiff. And the plaintiff thereby covenanted with the defendant that he

would pay unto the defendant the said sum of 410*l.* at the time and in manner aforesaid. And the said deed also provided that, until default should be made in payment of the said sum of money thereby secured, it should be lawful for the plaintiff to hold, possess and use the said goods, chattels and effects, without any hindrance or disturbance by the defendant; provided also that the bringing or placing the after purchased or after acquired personal estate and effects of the plaintiff upon the said premises should be deemed and taken to be sufficient evidence of the intention of the plaintiff to vest the property thereof in the defendant; and that the same should be so vested, and that he should have full right and power to seize and take possession of the same and every part thereof; and to sell and dispose of the same under and upon the trusts thereinbefore contained. It then averred that, after the making of the said deed, and before any default made by the plaintiff in the payment of the said sum of money, or any part thereof, the defendant, at twelve o'clock in the forenoon of the 20th *February*, 1860, gave to the plaintiff notice to pay the said sum of money to the defendant at half past twelve o'clock of the afternoon of the said 20th *February*, 1860; and that at the said hour of half past twelve o'clock of the afternoon of the said 20th *February*, 1860, the plaintiff not paying the said sum of money, the defendant wrongfully seized and took possession of the said live and dead farming stock, implements of husbandry, goods, chattels and effects of the plaintiff; and that, except as aforesaid, there never was any notice from the defendant to the plaintiff, appointing any reasonable earlier day or time for the payment of the said sum of money, or any part thereof, nor had the plaintiff any notice in that behalf, save as aforesaid; and that the said notice was

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an unreasonable notice ; and that no reasonable time after the giving of the said notice was allowed for the payment of the said sum of money ; and that the said notice was not a notice appointing any earlier day or time in pursuance of or in accordance with the said proviso in the said deed : and that the said seizure by the defendant was a seizure without any default on behalf of the plaintiff, save as aforesaid ; and that, after the said seizure by the defendant, the defendant wrongfully sold the said live and dead farming stock, implements of husbandry, goods, chattels and effects of the plaintiff as aforesaid. Allegation of special damage.

Demurrer, and joinder therein.

The defendant also pleaded, among other pleas : 1. Not guilty. 2. That the defendant, before the seizing &c., did, in pursuance of and under the provisions of the deed, duly give to the plaintiff, by delivering the same at his house, a notice in writing appointing an earlier day, to wit, the 20th *April*, 1860, for payment ; but that the plaintiff did not pay, and then wholly made default. Issues thereon.

On the trial, before *Blackburn J.*, at the Sittings at *Guildhall* after last *Hilary* Term, upon proof of the facts stated in the declaration, the learned Judge having left to the jury the question whether the notice given by the defendant was reasonable, the jury found a verdict for the plaintiff, damages 400*l.*, and leave was reserved to move to enter a verdict for the defendant.

In *Easter* Term,

Collier obtained a rule nisi accordingly ; or for a new trial on the ground that the notice was sufficient according to the true construction of the deed, and also that the damages were excessive.

The Court ordered that the rule should come on for argument with the demurrer.

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Collier (*H. T. Cole* with him), for the defendant.—The declaration is bad on the face of it, because it shews that a sufficient notice was given by the defendant to the plaintiff, under the proviso in the deed, to pay the money on an earlier day than the 30th *January*, 1870. The notice was not unreasonable in point of law, though it might be inconvenient. “What shall be reasonable time, the justices are to determine;” *Com. Dig.* 406, *Temps* (D.) Further, the declaration ought to have averred, not only that the notice was unreasonable, but that compliance with it was impossible; *Startup v. Macdonald*, in error (*a*). [*Wightman J.* It might not be impossible to comply with the notice if given in the middle of the night, but it would be an unreasonable notice. *Blackburn J.* Impossibility to comply with the notice merely by reason of inability to pay the money would be no excuse.] The present case is within that class in which the right of action or of entry accrues on demand; *Topham v. Braddick* (*b*), *Birks v. Trippet* (*c*); *e. g.*, in an action against the indorser of a bill of exchange, a plea that the action was commenced before a reasonable time for the payment of the bill by the defendant had elapsed after notice of dishonour was held bad; *Siggers v. Lewis* (*d*). [*Wightman J.* There is an obvious difference between bringing an action and seizing and selling goods. *Crompton J.* The contract made by accepting or indorsing a bill of exchange is to pay on demand.] If notice of an earlier day of payment must be given

(*a*) 6 *M. & Gr.* 593.(*c*) 1 *Saund.* 32.(*b*) 1 *Taunt.* 572.(*d*) 1 *Cr. M. & R.* 370.

1862. some time before entry and seizure, the debtor would
 BRIGHTY have an opportunity of getting rid of his goods.
 V.
 NORTON. As to the rule for reducing the damages : there was
 no evidence of special damage.

Coleridge (J. Martin with him), for the plaintiff, was not called upon, except as to the rule for reducing the damages. It was agreed that they should be reduced to 250*l*.

WIGHTMAN J. I am of opinion that this rule ought to be discharged. The question arises on a proviso in a deed, by which, in consideration of 410*l*. lent to the plaintiff by the defendant, the plaintiff assigned certain household furniture, farming stock, and goods and chattels and future personal estate to the defendant, subject to a proviso for redemption ; and the deed also contained a power for the assignor to retain possession of the assigned property until default in payment of the sum of money secured. The proviso for redemption is as follows. [His Lordship read it.] In the first instance, the parties contemplated repayment of the money lent at a distant day, namely the 30th *January*, in the year 1870 ; but the proviso goes on to enable the assignee to appoint an earlier day or time for payment, and, in default, gives a power of immediate entry and sale. Under this proviso the assignee gave notice to the assignor at twelve o'clock in the day to pay the amount in half an hour after ; and the question is, whether this is a valid notice to entitle the assignee, at the end of that half hour, to enter and sell ?

Mr. *Collier* was driven to contend that the terms of the proviso were equivalent to a power to enter and demand

the money at any time, and that, the original time for payment being the 30th *January*, 1870, that time might be shortened by a notice; and, in effect, that the money might be demanded immediately after the execution of the deed. But it is clear that this was neither the intention of the parties, nor the true meaning of the proviso, which must have a reasonable construction, namely that a notice to pay the money on an earlier day should not be given without allowing a reasonable time to elapse between the giving of the notice and the day for payment. If this is a question for the Court, I am of opinion that this notice did not allow a reasonable time; if it is a question for the jury, they have found that the notice was not reasonable, and in that finding I concur.

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CROMPTON J. This was an action for seizing and selling the goods of the plaintiff contrary to the proviso in the deed that, until default in payment of the money secured, the plaintiff should hold, possess and use them without any hindrance or disturbance by the defendant. We have to see whether default was made by the plaintiff in payment of the money, contrary to the proviso and the true intent and meaning of the deed. The primary intent of it was that the assignor should have ten years for repaying the money advanced, but there is a clause authorizing the assignee to appoint an earlier day or time for repayment: and the question is whether the assignee coming to the assignor and saying, "I desire you to pay me now," or "in five minutes," or "in half an hour," is the appointing of a day or time for payment within the meaning of the proviso, or is unreasonable and illusory, as the jury have found. I think the meaning of the proviso is that there should

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be an effective notice. I do not say whether a day's notice would be necessary, but the object of the deed was that the assignee should have some substantial time which might enable him to get the money: for it was not necessary that he should have it always at hand. The only other construction which can be put upon the proviso is that the money was payable immediately on demand, but the proviso does not say so.

BLACKBURN J. I agree that a debtor who is required to pay money on demand, or at a stated time, must have it ready, and is not entitled to further time in order to look for it. But here the question is on a proviso in a deed, and if the intention of the parties to the deed had been to give the creditor a right to enter and seize the goods of his debtor immediately after notice to pay, it would have been very easy, by apt words, to have expressed that intention. I think the fair meaning of the proviso, as it must have been understood by both parties, is that the debtor should have so long a notice of the day or time appointed for payment as would allow him a reasonable time to get the money. I admit the difficulty of saying what is a reasonable time, and the risk of a jury finding that a notice was not reasonable; but that is a matter which ought to have been considered by the creditor. This being a question for the jury, they have found that the notice was not reasonable, in which I think they were right, and therefore the rule on the point reserved must be discharged.

For the same reason the plaintiff is entitled to our judgment on the demurrer.

MELLOR J. In construing the proviso some effect

must be given to the words which require that the earlier day or time for payment shall be appointed by notice in writing. The parties intended that some notice should be given, and that must be a reasonable notice. On the demurrer the question is whether the declaration shews that a reasonable time for payment of the money, after the notice, was not allowed. I agree that, by a notice to pay in half an hour, a reasonable time was not allowed ; and therefore the plaintiff is entitled to our judgment.

The plaintiff is also entitled to have the rule for a new trial discharged on his consenting to reduce the damages to 250*l*.

Judgment for the plaintiff, and
rule discharged accordingly.

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The QUEEN *against* The Inhabitants of HASLE-
MERE.

Thursday,
November 27th.

By stat. 5 & 6 W. 4. c. 50. s. 95., if on the hearing of a summons respecting the repair of a highway the inhabitants of a parish, or other party charged therewith, deny their liability to repair, the justices shall direct a bill of indictment to be preferred at the next Assizes or Quarter Sessions ; "and the costs of such prosecution shall be directed by the Judge of Assize before whom the said indictment is tried, or by the justices at such Quarter Sessions," to be paid out of the highway rate. Under this section, an indictment having been directed by justices to be preferred, a bill was found at the Spring Assizes, and at the following Summer Assizes the defendants pleaded guilty, having some days before given notice to the prosecutor of their intention to do so: held, that the Judge had power to direct the costs of the prosecution to be paid out of the highway rate.

*Non repair of
highway.
5 & 6 W. 4.
c. 50. s. 95.
Indictment.
Costs.*

IN Hilary Term, *Montagu Chambers* obtained a rule calling upon the prosecutor to shew cause why the following order of *Blackburn J.*, which had been brought up by certiorari, should not be quashed :—

1862. "Surrey. At the Assizes and General Session of
 The QUEEN
 v.
 Inhabitants of
 HASLEMERE. oyer and terminer, holden at *Croydon*, in and for the
 county of *Surrey*, on *Thursday*, the 1st *August*, A. D.
 1861, before the undersigned Sir *Colin Blackburn*, Knt.,
 and others, justices of oyer and terminer and of assize for
 the said county: Whereas, at these Assizes, the inhabit-
 ants of the parish of *Haslemere*, in the said county, by
James Teasdale and *William Ayloyn*, two of the said
 inhabitants, appeared before me, the undersigned, and
 pleaded guilty, and are therefore convicted, upon an
 indictment against them, in and by which said indict-
 ment it was alleged that the said inhabitants ought to
 repair and amend, when and as often as it should be
 necessary, a certain part specified and particularly set
 forth in the indictment of a certain common and ancient
 Queen's highway in their parish" [the highway was
 described] "and that the said part of the said highway
 was, at the time of the finding of the said indictment,
 ruinous, miry, deep, broken and in great decay for want
 of reparation. And whereas it hath been made to ap-
 pear to me that, before the preferring of the said indict-
 ment, and after the coming into operation of" stat. 5 & 6
W. 4. c. 50, "to wit, on the 26th *January*, 1861, one *Francis*
Mortier Mercer, a credible witness, had made and exhi-
 bited information on oath to *George Best*, Esq., one of
 Her Majesty's justices of the peace for the said county,
 acting in and for the Petty Sessions Division of *Guild-*
ford, in the said county, setting forth the existence of
 the common and public highway aforesaid, and that the
 same was out of repair as aforesaid, and that the said
 inhabitants ought to repair and amend the same. And
 whereas it hath also been made to appear to me that
 the said *George Best*, so being such justice as aforesaid,

issued his summons, upon the hearing of which, at a special sessions for the highways, held at the Council Chamber in *Guildford*, in the said Petty Sessions Division of *Guildford*, in the said county, on the 9th *March*, 1861, before the said *George Best*, Esq., and *Edward Bray*, Esq., and others their fellows, justices of the peace as aforesaid, they the said last mentioned justices, having satisfied themselves in the manner required by the said Act hereinbefore recited that the said highway was and had been out of repair as aforesaid, were about to convict the said inhabitants as liable to the repair of the said highway, according to the form of the statute in such case made and provided, and that thereupon, and upon the hearing of the said summons, *James Nash* and *James Teasdale*, surveyors of the highways of the said parish, on behalf of the said inhabitants, denied their obligation and duty to repair the said highway. Wherefore the said last mentioned justices directed the said indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed at the then next Assizes for the said county. And whereas it appears to me that the said *Francis Mortier Mercer* hath prosecuted and proceeded with the said indictment in pursuance and conformity with the said direction, and the said *Francis Mortier Mercer* hath produced to me the order of the said justices directing that the indictment aforesaid should be preferred as aforesaid, and that such witnesses should be subpoenaed as aforesaid, and hath thereupon prayed that the costs of the said prosecution should be allowed to him under and in pursuance of the said Act: Now I, the said Sir *Colin Blackburn*, Knt., being the Judge of Assize before whom the said inhabit-

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1862. ants plead guilty to the said indictment and are there-
 The QUEEN upon convicted, do allow the said costs, amounting to
 v. the sum of 40*l.* 10*s.* 4*d.* And I do direct that such
 Inhabitants of costs be paid to the said *Francis Mortier Mercer* out of
 HASLEMERE. the rate made and levied, or to be made and levied in
 pursuance of the said Act, within the said parish of
 Haslemere, in which said parish the said highway is
 situate. Given under my hand and seal this 3d day of
 August, 1861."

(Signed) "*Colin Blackburn.*"

It appeared from the affidavits that the bill was found at the Spring Assizes at *Kingston*, in 1861; and some days before the commission day of the ensuing Summer Assizes at *Croydon*, notice was given by the attorney for the defendants to the prosecutor that they intended to plead guilty.

By stat. 5 & 6 *W. 4. c. 50. s. 95.* it is enacted: "If on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next General Quarter Sessions of the Peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the Judge of Assize before whom

the said indictment is tried, or by the justices at such Quarter Sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate."

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In *Michaelmas Term, November 8th*; before COCKBURN C. J., WIGHTMAN, BLACKBURN and MELLOR JJ.;

Mellish and *T. W. Saunders* shewed cause, and referred to stat. 25 & 26 *Vict. c. 61. s. 19.*

Montagu Chambers and *Beresford*, in support of the rule, cited *Reg. v. Aston Ingham, Hereford Summer Assizes, 1840*, and *Reg. v. Linton, Ibid.*, before *Williams J.*, cited in 1 *Russ. on Crimes*, 3d ed. by *Greaves*, 374, note (c); *Reg. v. The Inhabitants of Vowchurch (a)*, before *Platt B.*; *Reg. v. The Inhabitants of Stainhall (b)*, before *Pollock C. B.*; *Reg. v. Langley (c)*, before *Hill J.*

The arguments appear in the judgment of the Court.

COCKBURN C. J. expressed a wish that the question could be raised on the record.

Cur. adv. vult.

MELLOR J. now delivered the judgment of the Court.

The question in this case is whether, under the provision of the 95th section of The Highway Act, 5 & 6 *W. 4. c. 50.*, that, on an indictment directed by justices of the peace conformably to the requirement of the statute, the power given to the Judge of assize "before whom the said indictment is tried" to direct the costs of

(a) 2 *C. & K.* 393.

(b) 1 *F. & F.* 363.

(c) 2 *F. & F.* 170.

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the prosecution to be paid out of the rate, exists in a case in which, on the indictment having been found, the defendants plead guilty, so that, in the ordinary sense of the term, no trial in effect takes place.

If the question had arisen before us for the first time we should have had no hesitation in deciding in the affirmative ; but several instances having been cited to us in which learned Judges, sitting singly at the Assizes, had ruled the contrary, we thought it right, out of deference to the authority of those decisions, to take time to consider our judgment.

We have reason to think that considerable difference of opinion and diversity of practice has existed and may still exist on this question ; but it seems to us that some of the decisions referred to may be accounted for from the disinclination of Judges sitting singly to depart from a precedent set by a preceding Judge, and, as the case now comes for the first time before a Court in banc, we think that, entertaining a strong opinion on the point, we ought to give effect to that opinion, notwithstanding that individual Judges may, in some instances, have acted on a different view of the statute.

It seems to us that the words " Judge of assize before whom the said indictment is tried," used in the 95th section of The Highway Act, will apply to a case where an indictment preferred under that section comes under the cognizance and jurisdiction of a Judge of assize by the indictment being found in his Court, and the defendants being called on to plead to it before him, although, in consequence of the defendants pleading guilty, the indictment may not be tried before him in the ordinary sense of the term.

The Legislature having thought proper to provide that, where the defendants on a summons respecting the repair of a highway deny their liability to repair, the costs of the prosecution which the justices are required to direct shall be paid out of the rate, it appears to us impossible to suppose that a difference can have been intended to be made between a case where the defendants plead not guilty, and a trial thereupon takes place, and one in which, on the bill being found, the defendants, desisting from further resistance, plead guilty to the indictment. In either case the prosecutor is under the necessity of going to the assizes, and incurring the expense incidental to preferring the bill of indictment; and, although it is true that in the present case notice was given beforehand to the prosecutor by the defendants of their intention to plead guilty, yet the prosecutor was equally obliged to go to the assizes and prefer and support his indictment before a grand jury; and it is obvious that the argument founded on the language of the section, if valid, would apply equally to a case in which a prosecutor had preferred his bill in entire ignorance that the cause would not be tried, and had consequently taken all his witnesses to the assizes. There can be no reason why the prosecutor should not have such costs as he has in fact incurred in such a case, as well as where the cause has actually been tried; and we cannot suppose that the Legislature intended to make a distinction for which no reasonable ground exists. We are satisfied that all that was meant by the language in question (which, it must be admitted, was not very happily chosen) was to point out the Judge of assize in whose Court the indictment is disposed of as the

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authority by whom the costs of the prosecution should be directed to be paid. We are confirmed in this view by the fact that the section in question, when giving the same power to the Court of Quarter Sessions, omits the words "before whom the said indictment is tried." It cannot be supposed that the Legislature intended to give authority to the Court of Quarter Sessions to award costs when the defendant pleads guilty, and not to place the Judge of assize in the like position. It may be said, indeed, that if we place the construction contended for by the defendants on that part of the section which relates to a Judge of assize, we may consider the words "before whom the said indictment is tried," as understood after the words "the justices in Quarter Sessions." But this would be to take a startling liberty with the language of an Act of Parliament; and we think the anomaly which would otherwise occur will be best avoided by giving to the words on which the difficulty arises the larger and more reasonable construction to which we have already adverted.

For these reasons we are of opinion that this rule should be discharged.

Rule discharged, without costs.

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The GARNET and MOSELEY GOLD MINING COMPANY
OF AMERICA (LIMITED) *against* SUTTON.

Wednesday,
November 26th,

*Joint Stock
Companies
Acts, 1856,
19 & 20 Vict.
c. 47.,
21 & 22 Vict.
c. 60.
Contributory.
Liquidators.
Set-off.*

A joint stock Company, limited, under stats. 19 & 20 *Vict. c. 47.* and 21 & 22 *Vict. c. 60.*, proceeded to wind itself up, and appointed liquidators. An action having been brought by the liquidators on behalf of the Company against one of the shareholders in it, as a contributory to the Company, to recover the amount of a call on his shares: held, that the defendant was entitled to set off a claim which he had against the Company.

THE declaration alleged that, before and at the time of the passing of the 19 & 20 *Vict. c. 47.*, The Joint Stock Companies Act, 1856, and after the passing of the 7 & 8 *Vict. c. 110.*, for the registration, incorporation and regulation of Joint Stock Companies, the plaintiffs were a joint stock Company completely registered under the latter Act, and the defendant was the holder of 2000 shares in the Company; that the plaintiffs were a completely registered joint stock Company with limited liability, and, having duly obtained a certificate of incorporation under the 19 & 20 *Vict. c. 47.*; and that afterwards, and after the passing of the Joint Stock Companies Act, 1857 (20 & 21 *Vict. c. 14.*), at meetings of the Company, held according to the provisions of its deed of settlement, resolutions were passed to wind up the Company, and appointing liquidators for winding up its affairs and distributing the property; that the defendant being such shareholder in the Company, and a contributory to it within the meaning of stats. 19 & 20 *Vict. c. 47.* and 20 & 21 *Vict. c. 14.*, the liquidators called on him to pay on a certain day certain sums amounting to 500*l.*,

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being a call of 5s. on each of his shares : alleging performance, &c. by the plaintiffs, and non-payment by the defendant.

Plea, a set-off for money due by the plaintiffs to the defendant, for work, journeys and attendances as attorney and solicitor and otherwise for the plaintiffs, and for fees in respect thereof, and materials and necessary things provided in and about the said work for the plaintiffs, and for money paid for the plaintiffs.

Demurrer, and joinder therein.

Lush (Milward with him) in support of the demurrer.— In an action for calls by liquidators who sue in the name of a joint stock Company, limited, the debtor cannot pay himself by pleading a set-off of a debt due to him from the Company. Such a plea is indeed good in actions by the assignees of bankrupts, but then there is a special clause in the Bankrupt Act allowing it.

By stat. 19 & 20 *Vict. c. 47. s. 61.*, the shareholders of a Company, not limited, are liable to contribute to an amount sufficient to pay the debts of the Company, and the expenses of winding up ; but if the Company is limited “no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him.” There is no provision in the Act for a set-off or reduction of the amount due for calls. The plea of set-off admits that the plaintiff has not paid up his calls. Sect. 104 provides for the voluntary winding up of a Company, and gives powers to the liquidators appointed under sect. 88. This is a call under § 6 of that section in order to pay creditors. [*Mellor J.* It is not said that the liquidators are to take any cross demands into account. *Wightman J.* Could

the defendant, being a contributor, have sued the Company?] Yes. [*Blackburn J.* Could he have gone on after the winding up had begun?] He might have gone on to judgment, but execution would have been stayed. [*Holl, contra.*—By sect. 90 the liquidators may bring or defend actions.] Stat. 20 & 21 *Vict. c. 14. s. 13.* makes a call upon a contributory a specialty debt. The Joint Stock Companies Amendment Act, 1858, 21 & 22 *Vict. c. 60. s. 6.*, prevents actions against a Company in the case of a compulsory winding up, but this is a voluntary winding up by a resolution of the Company. Stat. 21 & 22 *Vict. c. 60. s. 17.* allows mutual credits before, but not after, winding up. [He also referred to sect. 18.]

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Holl, contra.—The defendant would be entitled to set off this claim independently of these statutes, and à fortiori can do so with their aid. The case comes within the words of the Statute of Set-off, 2 *G. 2. c. 22.*, which extend to all “mutual debts” between the same parties, and has always been construed literally. Thus it has been held that a debt due from a testator cannot be set off in an action by the executor, because there is no “mutual debt” between them (*a*). [*Blackburn J.* The reason is that the so doing would alter the distribution of the assets, and therefore the case is not within the spirit of the statute.] The question therefore is, do stats. 19 & 20 *Vict. c. 47.* and 21 & 22 *Vict. c. 60.*, relative to the winding up of joint stock Companies, make any difference? These statutes are only bankrupt Acts for joint stock Companies, where the liquidators stand in the place of assignees. Under the

(*a*) See *Watts v. Rees*, 9 *Exch.* 696; affirmed on error, 11 *Exch.* 410.

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Bankrupt Acts mutual credits between the bankrupt and his creditors may be set off. [*Blackburn J.* I think you will find that mutual credit in bankruptcy existed before the provisions in the Bankrupt Acts respecting it, and probably a century before the statute of set-off. There was an order about it in Lord *Nottingham's* time (a). And it was not necessary at law to plead such a mutual credit, for it could be given in evidence under the old general issue.] The operation of stat. 21 & 22 *Vict. c. 60. s. 17.* is not limited to proceedings under stat. 19 & 20 *Vict. c. 47. s. 104. § 9.*

Mihward (absente *Lush*), in reply.—This action is not brought by the Company, but by liquidators acting on its behalf, and to admit a set-off in such a case would defeat the intention of the Legislature. The Company is liable to the claims of all its existing creditors, and the liquidators have to provide a fund to meet them. The liquidators have, therefore, to arrange with the general body of shareholders how much each is to contribute, and each shareholder must therefore pay the whole amount so fixed. The defendant's claim may have arisen in the time of shareholders who have left the Company more than three years, and who, if it is allowed, ought in justice to be called on to reimburse the Company, but that is prohibited by statute.

WIGHTMAN J. The defendant is entitled to our judgment. This is the case of a Company with limited liability; and, by sect. 61 of stat. 19 & 20 *Vict. c. 47.*, "No contribution shall be required from any share-

(a) See the cases on this subject collected in 1 *Christian's Bankrupt Law*, 499, *et seq.*, 2d ed.

holder exceeding the amount, if any, unpaid on the shares held by him." And sect. 104. § 6., under which the present call is made, enacts: "The liquidators may at any time after the passing of the resolution for winding up the Company, and before they have ascertained the sufficiency of the assets of the Company, or the debts in respect of which the several classes of contributories are liable, call on all or any of the contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts of the Company and the costs of winding it up, and they may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same." Under that clause the liquidators are at liberty, before ascertaining the assets or debts of the Company, to make a call, which no doubt would be of a certain sum per cent. on the amount of the shares held by the several parties. But we have also sect. 17 of 21 & 22 *Vict. c. 60.*, which is general in its application to all joint stock Companies whether with limited liability or without. It says that "in fixing the amount payable by any contributory," *i. e.* upon a call made under sect. 104. § 6., "in pursuance of the Joint Stock Companies Acts or any of them, he shall be debited with the amount of all debts due from him to the Company, including the amount of the call, and shall be credited with all sums due to him from the Company on any independent contract or dealing between him and the Company, and the balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due," *i. e.* the sum due from him in respect of that call. Here, to an action by liquidators suing for the Company, the defendant pleads as a set-off that there was a sum due to him from the Com-

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pany. It seems to me that this section was introduced into the statute by analogy to The Bankrupt Act, under which the assignees are directed to take the account between the bankrupt and his debtor, and may recover only the balance. If they proceed without having ascertained what the balance is, the debtor may set off a debt owing to him by the bankrupt; and I see no reason why the same principle should not apply here.

CROMPTON J. had left the Court.

BLACKBURN J. I am of the same opinion. The 65th section of the 19 & 20 *Vict. c. 47.* enacts: "Any existing or former shareholder upon whom calls are authorized to be made by the third part of this Act is hereinafter called 'a contributory,' and the representatives of any deceased contributory shall be liable in a due course of administration, to the same extent as such contributory would be liable under the third part of this Act, if alive." I only cite that to shew what the word "contributory" means. Then sect. 104. § 6. no doubt provides that the liquidators may, before they have ascertained the sufficiency of the assets or debts of the Company, make calls for the sums which they anticipate will be necessary on the contributories; and § 9 of the same section says that, after the Company has been wound up and the creditors paid off, the liquidators are to adjust the rights of the contributories among themselves, and make calls for that purpose, taking into consideration that some of the contributories on whom those calls are made may fail to pay. If the question had stood on this Act, our decision would probably have been in favour of the defendant; for, there being no express words to take the case out of the Statute of Set-off, it would have

come within it. We need not, however, decide that point; for the subsequent Act, 21 & 22 *Vict. c. 60. s. 17.*, says: "In fixing the amount payable by any contributory, &c., he shall be debited with the amount of all debts due from him to the Company, including the amount of the call, and shall be credited with all sums due to him from the Company on any independent contract or dealing between him and the Company, and the balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due." This enacts, as appears to me, in express terms, that when a call has been made by liquidators, they are not immediately to receive the sum, but are to state it in an account with the debtor, and there are to be entered as items on the other side of that account any sums due to him on independent contracts between him and the Company. It is like the case of mutual credit in bankruptcy. If we were in the old times of special demurrers the present plea would hardly meet the requirements of this 17th section. To be strictly correct, it should have said that on the statement of account, after all the items had been brought into it, there was no balance due to the Company. But no such point is suggested here.

One observation remains. By sect. 61 of 19 & 20 *Vict. c. 47.*, in case of the shareholders becoming liable to contribute to the assets of the Company, the Company shall raise a certain sum. It may be that the whole amount in the hands of the liquidators has been exhausted by previous debts, and therefore that sum cannot be treated as one on which the debtor has a lien. Whether the Legislature intended to give the Company more when the liability of the contributories is not limited, or whether they have omitted the case, we cannot tell. It would not have been unreasonable if

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they had said, a man with limited liability shall have a lien of his own against any lien of the Company. But it is enough to say that, if they meant to exclude Companies with limited liability from the operation of this enactment, they have not so expressed themselves.

MELLOR J. At first I was much struck with the way in which it was put that, if contributories to Companies like this were not bound to pay the sums charged to them, some would get more money than they were entitled to. And probably, as my brother *Blackburn* says, if the matter had suggested itself to the mind of the person who drew the bill on which this Act was founded, words would have been introduced to meet the difficulty. But the words as they stand are too strong to be got over: when we find words used which are applicable to all Companies, we cannot decide that they do not apply to some, because, by that means, one class of their creditors may get an advantage over another.

Judgment for the defendant (a).

(a) The 19 & 20 *Vict. c. 47.* and the 21 & 22 *Vict. c. 60.* have been in great part repealed, and the law on the subject consolidated by the 25 & 26 *Vict. c. 89.*

GAY v. MATTHEWS (*Nov. 27th*) will be reported with the proceedings in the Exchequer Chamber.

MEMORANDUM.

John Osborne, Esq., of Lincoln's Inn, and James & George Burke, Esq., of the Middle Temple, were appointed of Her Majesty's Counsel learned in the law.

END OF MICHAELMAS VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XXVI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		CROMPTON J.
WIGHTMAN J.		MELLOR J.

SWEENEY, appellant, SPOONER, respondent.

*Saturday,
January 17th.*

1. Upon an information under stat. 5 G. 4. c. 83. s. 4., charging the respondent with running away from the parish of *B.*, whereby his wife became chargeable to that parish, it appeared that he and his wife had separated by consent in 1858, when she had means of support, and that they had no personal communication until 1861, when she became chargeable without his knowledge: Held, that he had not committed the offence charged.
2. *Quere.* Whether upon such an information the evidence of the wife is admissible against her husband?
- Vagrant Act,
5 G. 4. c. 83.
s. 4.
Leaving wife
chargeable.
Evidence.
Admissibility
of wife.*

CASE stated by a justice of the peace for the borough
of *Birmingham*, under stat. 20 & 21 *Vict. c. 43.*

Upon an information preferred by the appellant, one
of the relieving officers of the parish of *Birmingham*,
against the respondent, under stat. 5 G. 4. c. 83. s. 4.,

1868. . which charged that he, on the 18th *February*, 1862, ran
away from the parish of *Birmingham*, whereby his wife
became chargeable to that parish, it was proved that
the wife of the respondent became chargeable to the
parish of *Birmingham* on the 27th *November*, 1861, and
continued to be so chargeable until the hearing of the
information. The respondent had been for some time
and was then employed as schoolmaster at *Quarry Bank*,
about twelve miles from *Birmingham*. But it was not
proved that any communication of the fact of the wife's
chargeability had ever been made by the appellant to
the respondent, before the issuing of the warrant in this
case. The place of legal settlement of the respondent
and his wife was *Swansea*, in *South Wales*, where they
had lived and cohabited for several years, previously to
the year 1858, when they parted by mutual consent,
and had had no personal communication from that time
till the hearing of this information. On the separation
of the respondent and his wife in 1858, at *Swansea*, she
was left in possession of certain mines and other pro-
perty, in which she had a life interest under the will of
a former husband.

The justice, being of opinion that the evidence given—
before him did not bring the case within the operation—
of stat. 5 *G. 4. c. 83. s. 4.*, dismissed the information.

The appellant also tendered the wife of the respond-
ent as a witness, to give evidence against her husband
in support of the information, but the justice refused to
receive her evidence.

The questions for the opinion of the Court were,
First, Whether under the facts stated the respondent was
or was not guilty of the offence of running away from
the parish of *Birmingham*, on the day and at the time
mentioned in the information, whereby his wife became

chargeable to that parish, and liable therefore to be deemed a rogue and vagabond within the meaning of stat. 5 *G. 4. c. 83. s. 4.*; and secondly, Whether the evidence of the wife of the respondent was or was not properly refused.

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No counsel appeared for the respondent.

I. Spooner, for the appellant.—Stat. 5 *G. 4. c. 83. s. 4.* enacts, that “every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township or place,” shall be deemed a rogue and vagabond, and may be committed to the house of correction, and kept to hard labour for any time not exceeding three calendar months. The magistrate seems to have thought that, in order to render the respondent liable to be convicted, he must have had notice that his wife was chargeable. But in *Heath v. Heape* (a) it was considered that a man who left his wife was within the statute as soon as she became actually chargeable. [*Crompton J.* In that case it must have been meant that he was within the statute if he was purposely keeping away.]

WIGHTMAN J. The respondent was charged, under stat. 5 *G. 4. c. 83. s. 4.*, with being a rogue and vagabond by reason of his running away from the parish of *Birmingham*, “whereby his wife became chargeable to that parish.” The statute contemplates the case of a man deserting his wife and leaving her without any means of support. The facts of this case shew a very

(a) 1 *H. & N.* 478.

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different state of things. The separation of the respondent from his wife in 1858, when he left her with means apparently sufficient for her support, cannot be contended to be an offence within the statute. Nor do the circumstances occurring afterwards constitute such offence, because the respondent had no reason to believe that his wife was chargeable to the parish.

Upon the other point which has not been argued it is unnecessary to give an opinion.

CROMPTON J. The respondent left his wife in 1858; but she was not left chargeable to the parish. It is said that, so soon as she became chargeable, the respondent was liable under stat. 5 *G.* 4. *c.* 83. *s.* 4.; in effect, that he became criminally liable, though he was not the cause or aware of her being chargeable; and *Heath v. Heape* (a) was cited in support of that position. But the husband cannot be made guilty by relation without being aware that his wife had not the means of support.

As to the other point: if we thought that the evidence of the wife was improperly rejected, the case could only be sent back to the magistrate. The act with which the respondent was charged was clearly criminal, and in such cases a wife cannot be heard to give evidence against her husband; but possibly the act was also a wrong to herself in proof of which she might be examined; and therefore there is some doubt about the point (b).

MELLOR J. concurred.

Order affirmed (C).

(a) 1 *H.* & *N.* 478.

(b) See *Parker*, appt., *Green*, respt., 2 *B.* & *S.* 239.

(c) See *Reeve v. Yeates*, 1 *H.* & *C.* 435.

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The QUEEN *against* The Venerable JOHN MOORE STEVENS, Clerk, Archdeacon of the Archdeaconry of EXETER, and The Rev. HENRY WOOLLCOMBE, Clerk, Coadjutor to the said Archdeacon, or other the proper person on whom the duty devolves.

Saturday,
January 17th.

Church Building Acts.
District parish.
Churchwarden of old parish.
Election.

A district which, by order in council, under stat. 59 G. 3. c. 134. s. 16., is assigned to a chapel in a parish, becomes a separate parish for all ecclesiastical purposes, but continues a part of the parish for other parochial purposes, and therefore the inhabitants of the district are entitled to vote in the election of churchwarden for the parish.

MANDAMUS reciting, among other things, that *Thomas Charles Tothill*, an inhabitant and parishioner of the parish of *Topsham*, in the county of *Devon*, had been duly nominated, elected and chosen into the office of churchwarden of the parish, according to the custom of the parish: commanded the defendants to administer or cause to be administered to him the oath or declaration required to be taken by him as churchwarden.

Return: that *Thomas Charles Tothill* was not duly elected and chosen into the office of churchwarden of the parish of *Topsham*.

Plea: that *Thomas Charles Tothill* was duly elected and chosen into the office of churchwarden of the parish of *Topsham*.

Issue thereon.

By order of a Judge the following special case was stated.

Before and at the time of the making of the order in

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council, and of the making of the representation of the Commissioners hereinafter mentioned respectively, a parochial chapel called the chapel of *St. Luke* had been built and consecrated at *Wear*, in the parish of *Topsham*, in the county of *Devon* and Diocese of *Exeter*.

By an order in council, made on the 23d *May*, 1844, reciting, amongst other things (as the fact was), that the Commissioners hereinafter next mentioned had made a representation to Her Majesty in Council, bearing date the 11th *April*, 1844, in the words following, viz. : "Your Majesty's Commissioners for building new churches appointed by virtue of" stat. 58 *G. 3. c. 45.*, "intituled 'An Act for building and promoting the building of additional churches in populous parishes,' continued by" stat. 7 & 8 *G. 4. c. 72.*, "intituled, &c., and further continued by" stat. 7 *W. 4 & 1 Vict. c. 75.*, "intituled, &c., beg leave humbly to represent to your Majesty that, having taken into consideration all the circumstances attending the parish of *Topsham*, in the county of *Devon*, and diocese of *Exeter*, it appears to them to be expedient that a particular district should be assigned to the consecrated chapel of *St. Luke* at *Wear* in the said parish under the provisions of the 16th section of" stat. 59 *G. 3. c. 134.*, "intituled, &c., and that such district should be named 'The Chapelry District of *Wear*,' and consist of the northernmost part of the parish of *Topsham*, with boundaries as follows, &c. That marriages, churchings, baptisms and burials should be solemnized and performed in the said chapel, and that the fees arising therefrom should be received by and belong to the minister of the said chapel. That the consent of the Lord Bishop of *Exeter* has been obtained thereto as required by the above mentioned section of the said Act" 59 *G. 3. c. 134.*, "in testimony whereof the said Lord

Bishop has signed and sealed the present instrument. Your Majesty's Commissioners therefore beg leave to lay before your Majesty the before mentioned circumstances, and humbly pray that your Majesty will be graciously pleased to take the premises into your royal consideration, and to make such order in respect thereto as to your Majesty, in your royal wisdom, shall seem meet." And further reciting that Her Majesty, having taken the said representation, together with the map thereunto annexed, into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof. It was ordered that the proposed assignment should be accordingly made, and the recommendation of the said Commissioners in respect of the solemnization of marriages, churchings, baptisms and burials, and the fees arising therefrom, should be carried into effect agreeably to the provisions of the said Acts.

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At the time of the making of the representation of the Commissioners all requisite consents for the purposes therein mentioned had been obtained, and the order in council was duly published in the *London Gazette*, and everything happened and was done to render the same and the representation of the Commissioners respectively valid and effectual in law, and the Commissioners caused the boundaries of the district assigned to the chapel to be duly enrolled in the High Court of Chancery and in the office of the Registry of the Diocese.

Ever since the making and publication of the order in council, two persons have annually been appointed churchwardens of the chapelry district of *Wear*, in pursuance of the provisions of the statute in that behalf. The district of *Wear* is locally situate within and is part

1863. of the parish of *Topsham*, and the inhabitants thereof
The QUEEN are and always have been assessed to and paid all the
V. parochial rates of the parish of *Topsham* in the same
STEVENS. manner as the inhabitants of the rest of the parish, and
no separate officers are or have been appointed for the
district except two churchwardens as aforesaid ; but
since the twenty years expired from the consecration of
the district church, a separate church rate has been
made for the district, as directed by the 58 G. 3. c. 45.
s. 71.

On the 1st *April*, 1861, a vestry meeting of the inhabitants of the parish of *Topsham* was duly held in the parish (pursuant to notices affixed at the church door of the parish church and also at the door of the chapel at *Wear*, signed by the prosecutor himself, as one of the then churchwardens of the parish), for the purpose of nominating and electing two churchwardens for the parish of *Topsham* for the then ensuing year. The Reverend *John Arundell Leahey*, the perpetual curate of the parish, was chairman of the meeting, and appointed thereat *George Burrington*, an inhabitant of the parish, to be his churchwarden for such year. It is admitted that such appointment was valid. *George Hurdle* and *Thomas Charles Tothill* being respectively parishioners of the parish, and respectively duly qualified to be elected to the office of churchwarden of such parish for the same year, were respectively at the meeting duly proposed and nominated for the office of parishioners' churchwarden for the parish for the same year, and, upon a show of hands being then and there duly taken in that behalf, *George Hurdle* was declared by the chairman to be upon show of hands duly elected to fill such office for such year. A poll was thereupon then and there duly demanded for *Thomas Charles*

Tothill, and then and there duly granted and taken accordingly. Upon the taking of the poll, 258 persons voted in favour of *George Hurdle*, and the number of votes recorded by them for him amounted to 812 and no more. Seventy-five of the persons so voting in favour of *George Hurdle* were inhabitants resident at the time in the chapelry district of *Wear*, and not in any part of the parish of *Topsham* out of and beyond such district, and the number of votes recorded by such persons was ninety-one and no more; and five of such persons, representing sixteen of the said ninety-one votes, voted in respect of property situate in the parish of *Topsham*, out of the district of *Wear*, and were duly qualified so to vote in all other respects, unless disqualified by such their residence in the chapelry district of *Wear*, and the remainder of the said seventy-five persons voted in respect of property situate in the chapelry district, and had no other qualification entitling them so to vote. Upon the said poll 255 persons duly qualified in that behalf voted in favour of *Thomas Charles Tothill*, and the number of votes recorded by them was 256.

The question for the opinion of the Court was whether the persons, or any of them, resident in the chapelry district of *Wear*, and who voted for *George Hurdle* on the taking of the poll, were entitled to vote in respect of the property aforesaid. If the Court should be of opinion that those persons were not entitled to vote, then judgment was to be entered for the prosecutor. If the Court should be of opinion that they were entitled to vote, then judgment was to be entered for the parties making the return.

T. Jones (Northern Circuit) (*Karslake* with him), for

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the prosecutor.—The parishioners of the new parish of *Wear* were not entitled to vote in the election of churchwarden for the mother parish of *Topsham*, of which it is a district.

The first Church Building Act 58 *G. 3. c. 45.*, authorized, under certain conditions, orders in council for creating separate parishes or ecclesiastical districts in populous parishes. [He cited sects. 16, 21, 24.] The terms parishes and ecclesiastical districts are used in those sections as convertible terms: the ecclesiastical districts are to be parishes for all ecclesiastical purposes. [*Montague Smith*, contra, referred to sect. 31, by which no divisions of any parish or extraparochial place shall affect or in any manner be construed to affect the parish &c., or the persons residing therein, in any other respect than in that Act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish &c., or to the maintenance or relief of poor persons, &c., or to any powers relating to any such rates, or holding vestries, or appointment or powers of parish officers, &c., “save and except as to church rates in so far as the same are regulated by the provisions of this Act; but the original parish shall to all such purposes remain and continue in law a parish to all intents, as if no such division thereof into separate parishes or district parishes had been made.”] Sect. 70 authorizes rates for the repairs of district churches; and sect. 71 subjects the district to the repairs of the original parish church for twenty years. Sect. 73 provides for the election of churchwardens for every church or chapel built under that Act, one by the incumbent and the other by the inhabitant householders residing in the district to which the church or chapel

belongs. The Amending Act, 59 *G. 3. c. 134.*, effects the same object of building churches in populous parishes in another way. Sect. 16 empowers the Commissioners, subject to the same conditions as in the former Act, to assign a district to any chapel already existing or built, without dividing the parish into districts. The district of *Wear* is the case of a district formed under that section. Sect. 23 empowers the churchwardens &c. of any parish or division of any parish, or of any consolidated or district chapelry, to recover church rates: "Provided always, that any churchwardens or chapelwardens appointed under the provisions of the said recited Act" 58 *G. 3. c. 45.*, "or this Act shall not in virtue of such office be deemed overseers of the poor."

By the New Parishes Act, 1843, 6 & 7 *Vict. c. 87. s. 15.*, it is enacted, that when any church or chapel shall be built, purchased, or acquired in any district constituted under the Act, such district shall, after the consecration of the church or chapel, be and be deemed a new parish for ecclesiastical purposes. And sect. 17 provides for the election of churchwardens for such new parish. [*Crompton J.* Officers for the whole parish are wanted for parochial purposes other than ecclesiastical: as to them these districts are left in the state they were in before. *Montague Smith*, referred to the proviso at the end of sect. 17, by which nothing in the Act contained "shall render any such churchwardens liable or competent to perform the duties of overseer of the poor in respect of such their office of churchwardens;" and to sect. 18, by which, "until Parliament shall otherwise determine, nothing herein contained shall be construed to affect or alter any rights, privileges, or liabilities whatsoever, ecclesiastical or civil, of any parish, chapelry, or district, except as is herein expressly provided."]

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1868. By the New Parishes Act, 1856, 19 & 20 *Vict.*
 The QUEEN c. 104. s. 15., the incumbent of every new parish created
 V. pursuant to the provisions of stat. 6 & 7 *Vict.* c. 37. or
 STEVENS. of stat. 7 & 8 *Vict.* c. 94., shall have sole and exclusive
 cure of souls and the exclusive right of performing all
 ecclesiastical offices within the limits of the same, for
 the resident inhabitants therein, "who shall for all
 ecclesiastical purposes be parishioners thereof, and of
 no other parish, and such new parish shall, for the
 like purposes, have and possess all and the same rights
 and privileges, and be affected with such and the same
 liabilities, as are incident or belong to a distinct and
 separate parish, and to no other liabilities." The effect
 of this section is, that the parishioners of the district are
 excluded from intermeddling in the ecclesiastical affairs
 of the parish of *Topsham*; and they would contravene
 it by voting in the election of an officer some of whose
 duties are ecclesiastical. [*Wightman J.* The liability
 of the inhabitants of the district to the poor rate for the
 whole parish continues; and that must be a liability as
 parishioners of *Topsham*.] [Sect. 14 was also referred
 to.]

Montague Smith (*Kingdon* with him), contra, was not
 called upon.

WIGHTMAN J. All doubt vanishes on reading the
 sections of stat. 58 *G.* 3. c. 45. and the other Church
 Building Acts. After the district of *Wear* was assigned
 to the chapel of *St. Luke* under stat. 59 *G.* 3. c. 134.
 s. 16., it became a separate parish for all ecclesiastical pur-
 poses, and the inhabitant householders had power to elect
 churchwardens, who were to act within the district for
 all ecclesiastical purposes; but the administration of the

Poor law in such districts remains as before, and there is to be no appointment of overseers in them. And since the power of the churchwardens and overseers of the original parish to levy poor rates within the district as part of the mother parish, though they are separate parishes for ecclesiastical purposes, continues, it would be very anomalous if the inhabitants of the district had no voice in the election of the officers who are to lay those rates upon them. Nor do I find any words to prevent inhabitants residing in the district from voting in the election of churchwardens as well as overseers of the mother parish, they being directly interested in the persons who are to have authority over them, in assessing the poor rate. A clear distinction is made in the statutes between ecclesiastical and other parochial matters.

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CROMPTON and MELLOR JJ. concurred.

Judgment for the defendants.

**The QUEEN against The NEWPORT Local Board
of Health.**

Saturday,
January 17th.

Public Health
Act, 1848,
11 & 12 Vict.
c. 63. s. 69.
Street.
Sewering and
paving.
Frontage.
Railway and
Canal Com-
pany.

1. Under The Public Health Act, 1848, 11 & 12 Vict. c. 63. s. 69., which empowers every Local Board of Health to require the owners or occupiers of premises fronting, adjoining, or abutting upon a street (not being a highway), to sewer, level, pave, flag, or channel the same, and in default to execute the works required, and charge the expences on the owners, according to the frontage of their premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), the expence of each owner should be apportioned according to the frontage of the premises, irrespective of the width of the street.

2. Under that enactment a railway and canal Company, whose premises abut on a street, but with a fence between them and the street, is liable to be charged.

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ON appeal at the *Monmouthshire* Quarter Sessions in *December*, 1861, against an order of three justices for the borough of *Newport*, requiring the appellants, *Thomas Powell* and *Thomas Powell* the younger, to pay the sum of 45*l.* 19*s.* 9*d.* to the respondents for certain sewerage and flagging works therein mentioned, the Sessions quashed the order, subject to the opinion of this Court on the following case.

The order appealed against was made under The Public Health Act, 1848, 11 & 12 *Vict. c.* 63. *s.* 69.

The appellants are owners of warehouses, yards, &c., fronting, adjoining and abutting on a roadway called *Canal Parade*, and the respondents are The Local Board of Health of *Newport*. *Canal Parade* is bounded on the one side by the houses, warehouses, &c. of the appellants and others, and on the other by the fence of *The Monmouthshire Railway and Canal Company*. *The Monmouthshire Railway and Canal Company*, originally a canal Company under stats. 32 *G. 3. c.* 102. and 37 *G. 3. c.* *s.* 7., were thereby required to fence off the canal, towing path and works from the adjoining lands, and, under succeeding Acts, laid down a railway in addition to the canal.

In *November*, 1860, notice was given by the respondents to the appellants (amongst others) to sewer, level, pave, flag and channel the part of *Canal Parade* upon which their premises fronted, adjoined and abutted; and, in consequence of their non-compliance with that order, the works mentioned and referred to in the notice were executed by the respondents, and the expences incurred therein were, in *July*, 1861, settled by the surveyor in the proportions following:

"Roadway and Pavements, &c. *Canal Parade*. I hereby apportion the costs of laying down new flagged, curbed and asphalted footways, and of forming roadways, &c., on *Canal Parade* between *Llanarth Street* and *Granville Street* amongst the owners or lessees of the several properties adjoining as follows; the costs of the roadway at the different street ends as well as the sewer gratings being paid by the Local Board of Health."

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Then followed a schedule with columns headed "Owner, Agent or Lessee," "Description of Property," "Cost," in which the appellants and other owners or lessees were assessed, the sum apportioned to the appellants being 45*l.* 19*s.* 9*d.*; but *The Monmouthshire Railway and Canal Company* were not assessed.

It was contended by the respondents that this apportionment was conclusive for want of a written statement of objection by the appellants within three months from service on them of notice of it; but the Court decided for the appellants.

In consequence of the non-payment by the appellants of their proportion of the above expences, the order appealed against, dated the 20th *November*, 1861, was duly made and served upon the appellants; and notice of appeal, directed to the respondents, was served upon them the same day, containing, among others, the following grounds of appeal. "Because the amount of the expences so charged to us, and which the said order requires us to pay, had not been duly apportioned by your surveyor. Because a moiety, or some part of the amount was due from *The Monmouthshire Railway and Canal Company*."

At the hearing of the appeal it was contended, amongst other things, by the appellants, that the amount of the

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expences so charged to them, and which the order required them to pay, had not been duly apportioned by the respondents' surveyor, because a moiety, or some part of the said amount, was due from *The Monmouthshire Railway and Canal Company*, and the Court decided in their favour, and discharged the order of the justices.

It was further contended by the appellants that the principle adopted by the respondents was wrong, inasmuch as the expence was apportioned according to the length and width of the roadway in front of the individual premises, instead of by a division of the whole expence according to the longitudinal measurement; and the Court decided that point also in favour of the appellants.

If this Court should be of opinion that the Sessions were right in quashing the order on either of these points, the order of the justices was to be discharged, and the order of the Sessions was to stand. If this Court should be of opinion that the Sessions were wrong upon both these points, then the order of the justices was to be confirmed and the appeal discharged. If this Court should be of opinion that, on the second point, the Sessions should have reduced the amount of the expences named in the order instead of quashing it, then the order of the justices was to be confirmed, and the expences to be paid by the appellants be reduced from 45*l.* 19*s.* 9*d.* to 45*l.* 14*s.* 9*d.*

Smythies (*J. J. Powell* with him), for the appellants.—
 First. The Public Health Act, 1848, 11 & 12 *Vict.* c. 63. *s.* 69. enacts, that in case any street (not being a highway) “be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of

Health, such Board may, by notice in writing to the owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works referred to therein; and the expences incurred by them in so doing shall be paid by the owners in default, according to the frontage of their premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided for by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said local Board to be private improvement expences, and be recovered in the manner hereinafter provided." The surveyor, in apportioning among the defaulting owners the expenses of work done by the Board, has exonerated *The Monmouthshire Railway Company* from all payment on the ground that they received no benefit because their railway was fenced off from and had no communication with the street. By the Statute of Sewers, 23 H. 8. c. 5., no person was to be rated unless benefited; but by The Public Health Act, 1848, the expences are to be charged on all whose premises front, adjoin or abut on the street, and the surveyor has no duty but that of measurement, all the owners of such property being taxed for an assumed benefit.

Secondly. The expenses have not been apportioned according to the "frontage," that is, "the length of

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boundary towards the street" of the premises charged; but, according to that length, multiplied by the width of the street, giving a superficial instead of a linear measure. The word "frontage," though not found in the Dictionaries of *Johnson*, *Webster* or *Richardson*, is well known to surveyors. [*Crompton J.* The Legislature has not thought it worth while to vary the liability according to the width of the street.]

Welsby (with him *Granville Somerset*), for the respondents.—First. The power intended to be given to the Local Board by sect. 69 was to charge the owners or occupiers of premises on either side of the street in proportion to the benefit received by them. [*Mellor J.* The section assumes that the premises on both sides of the street would be benefited by the works to be ordered. *Crompton J.* The premises of the appellants receive the benefit intended by the section, which is the having a street in front of them. *Mellor J.* Suppose the whole frontage of premises abutting upon the part of the street requiring to be sewered, paved, &c. was a dead wall, but a way to the premises started a little before that part.] Railway premises are not rateable at all. [*Smythies.*—By the interpretation clause, sect. 2, the word "premises" shall include messuages, buildings, lands, and hereditaments of any tenure. *Wightman J.* The appellants come within the terms of sect. 69. *Crompton J.* And the other point is still clearer.]

Per CURIAM: (WIGHTMAN, CROMPTON and MELLOR JJ.—)

Order of Sessions affirmed.

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The QUEEN *against* The Inhabitants of St.
ALKMUND, DERBY.

Saturday,
January 17th.

Order of
removal.
Copy deposi-
tions.
Notice of
appeal.
11 & 12 Vict.
c. 31. s. 3.

On the 26th *October*, an order for the removal of a pauper from *A.* to *C.* was served on the overseers of *C.* On the 6th *November* a letter was written to the overseers of *A.* by the assistant overseer of *C.* applying for a copy of the depositions of the grounds of removal, adding, "as it is intended to appeal against such order of removal." No notice was taken of this letter. On the 11th *December* a formal notice of appeal was given by the overseers of *C.* to the overseers of *A.* On the 20th *December* application was made by the overseers of *C.* to the clerk to the justices for a copy of the depositions, which was received on the next day, and notice was given to the overseers of *A.* that the appeal would be entered and respited at the next Sessions, which was accordingly done. Held, that the Quarter Sessions had no jurisdiction to enter and respite the appeal; inasmuch as,

1. The application for a copy of the depositions being made to the overseers of the removing parish, and not to the clerk to the justices, was not sufficient within stat. 11 & 12 *Vict. c. 31. s. 3.*

2. The letter of the 6th *November* was not a notice of appeal.

THIS was a rule calling on the prosecutors to shew cause why an order of Sessions, made in an appeal between the inhabitants of the township of *Crick*, in the county of *Derby*, appellants, and the inhabitants of the township of *St. Alkmund*, in the borough of *Derby*, respondents, touching the settlement of *Hannah Hudson* and her three children, whereby it was ordered that the said appeal be entered and respited, should not be quashed.

An order of removal of *Hannah Hudson*, wife of *George Hudson*, and their three children, dated the 23d *October*, 1861, and accompanied by a statement of chargeability, was sent by post, addressed to the churchwardens and overseers of the poor of the township of *Crick*, on the 25th *October*, 1861, and was received by them on or about the 30th *October*. On the 6th *November*, by the direction of the churchwardens and overseers

1863. of the poor of the township of *Crick*, the assistant overseer wrote and sent by post, addressed to the churchwardens and overseers of the poor of the township of *St. Alkmund*, the following letter:—

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“The Parish of *Crick*, Nov. 6th, 1861.

“To the Parish of *St. Alkmund*, *Derby*.

“Gentlemen,

“The churchwardens and overseers of the parish of *Crick* have ordered me to apply to you for a copy of the depositions of the grounds of removal of *George Hudson*, a pauper lunatic, now charged to the parish of *St. Alkmund*. Also I hereby apply for a copy of the depositions of the grounds of removal of *Hannah Hudson*, wife of *George Hudson*, and *Isaac George*, aged 6 years, *Elizabeth* and *Sarah Ann*, their three children, as it is intended to appeal against such order of removal.

“To the Churchwardens and “I am, Gentlemen,

“Overseers of the Poor of the “Yours truly,

“Parish of *St. Alkmund*.” (Signed) “*R. W. Smith*,

“Assistant Overseer of *Crick*.”

This letter was received by the churchwardens and overseers of the township of *St. Alkmund* on the 7th November.

No notice of this application was taken by the churchwardens and overseers of the township of *St. Alkmund*, the reason given in the affidavit for the respondents being that the custom always was for such application to be made to the clerk to the justices making such order, and that sect. 3 of the 11 & 12 *Vict. c. 31*. pointed him out as the proper party to furnish such copy depositions.

On the 21st November the paupers were removed under the order.

On the 11th *December* a formal notice of appeal against the order was given ; and on the 20th *December* application for a copy of the depositions was made by the assistant overseer of the township of *Crick* to the clerk to the justices who made the order of removal : and such copy was received by the churchwardens and overseers of the township of *Crick* on the 21st *December* : and, on the 26th *December*, their attorney wrote a letter to the churchwardens and overseers of the township of *St. Alkmund*, informing them that, the copy depositions having been delivered only on the 21st inst., the overseers of the township of *Crick* would not try the appeal at the next *Epiphany* Sessions for the borough, but merely enter and respite it. A motion to enter and respite the appeal was accordingly made at those Sessions, on the ground that the churchwardens and overseers of the appellant township had not had time after the receipt of the copy of the depositions to give notice of appeal, serve grounds of appeal, and prepare for the trial of it. The motion was opposed by the churchwardens and overseers of the respondent township, on the ground that, as the application for copy of depositions to the churchwardens and overseers of the respondent township was informal, and should have been made to the clerk to the justices making such order ; and that, as no notice of appeal had been given within the twenty-one days after the service of the grounds of removal, as required by the 11 & 12 *Vict. c. 31. s. 9.* ; and as no application for copy of the depositions was made to the proper officer until long after the expiration of the twenty-one days allowed by the 11 & 12 *Vict. c. 31. s. 9.*, the appellants were out of Court, the Recorder having no discretionary power in

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the matter. The Recorder however made an order that the appeal should be entered and respited.

Cave shewed cause.—First. The application made in the letter of the assistant overseer of the appellants to the respondents, for a copy of the depositions on which the order of removal was founded, was a sufficient application within the meaning of stat. 11 & 12 *Vict. c. 31. s. 3.*, which enacts that the clerk to the justices who make any order of removal shall keep the depositions on which it was made, and shall, within seven days, furnish a copy of them to the overseers or guardians of the parish to which the removal is directed to be made, if such overseers or guardians shall apply for such copy, and pay for the same at a specified rate. The application may be made to the clerk of the justices, or to the overseers of the removing parish. Sect. 9, which requires that notice of appeal shall be given within twenty-one days after the notice of chargeability and statement of the grounds of removal have been sent, allows a further period of fourteen days, if “within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid” by the overseers of the parish to which the order is directed. [*Crompton J.* Why should the appellants apply to the overseers of the removing parish who have not got the depositions?] They may not know who is the clerk of the justices? [*Mellor J.* The clerk of the justices is to furnish copies of the depositions to the overseers of the parish to which the removal is directed, upon payment of certain fees.] The appellants were misled by the respondents taking no notice of the letter applying for a copy of the depositions; and therefore

the respondents cannot be heard to say that the application made to them was insufficient.

Secondly. The letter was a good notice of appeal, and therefore the notice was in time. [*Crompton J.* The appellants hardly meant it to be considered as a notice of appeal until they had seen the depositions.] The letter would lead the respondents to make preparation for the appeal, and render the appellants liable for costs if they failed.

Hayes Serjt. and *Metcalfe*, who appeared to support the rule, were not called upon.

WIGHTMAN J. The words of stat. 11 & 12 *Vict. c. 31. s. 3.* are clear that the application for a copy of the depositions is to be made to the clerk of the justices; and it is not a sufficient excuse for non-compliance with that enactment that the officers of the parish to which the order is directed may be wholly unaware who the clerk to the removing justices is, and that the respondents ought to have informed them that they were wrong in applying to them.

With respect to notice of appeal having been given, the letter of the assistant overseer does not profess to be a notice, and the appellants themselves shewed that they did not mean it to be such, as they afterwards sent a regular notice. The phrase "as it is intended to appeal," means if ground for doing so should be discovered when the depositions were sent.

CROMPTON and MELLOR JJ. concurred.

Rule absolute.

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Tuesday,
January 20th.

In re The Guardians of the Poor of BLYTHING
Union against WARTON.

*Nuisances
Removal Act
for England,
1855, 19 & 20
Vict. c. 121.
ss. 2, 19.
Order.
Costs and
expences.
Owner.*

On the 26th June, 1861, an order of justices was made under The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121.*, on the owner of premises, to abate certain nuisances, and was served by being left on the premises. The order not having been obeyed, the local authority, on the 16th July, commenced the necessary works, which were finished on the 7th September. The owner was resident in *Australia*, and on the 21st May, 1861, executed a power of attorney to the defendant to receive the rents: the defendant received the power of attorney on the 22d July, and acted upon it by receiving the rents due at *Michaelmas*. By sect. 2 the word "owner" includes any person receiving the rents as trustee or agent. By sect. 19, the costs and expences incurred in obtaining an order and in carrying the same into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; and in case of nuisances by the act or default of the owner, the premises shall be and continue chargeable; and such costs and expences may be recovered in any county or superior Court. Held, that the defendant, not being "owner" within sect. 2 at the time when the order was made, was not liable to an action for the costs and expences under sect. 19.

CASE on appeal from the County Court of *Suffolk*,
holden at *Halesworth*.

This action was brought to recover from the defendant, as the owner of premises situate at *Sotherton*, in the county of *Suffolk*, within the meaning of The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121.*, the sum of 21*l.* 1*8s.* 1*d.*, as money paid for the use and at the request of the defendant, being the amount of expenses incurred by the plaintiffs as the local authority, in obtaining and carrying out an order of justices, made on the 26th June, A. D. 1861, under that Act, for the abatement of nuisances then existing upon the premises.

The premises were known to be the property of *W. Suggate*, who, at the time of the commencement of the

proceedings to abate the nuisances hereinafter mentioned, was, and continued to be resident in *Australia*.

The defendant, who is a solicitor residing and carrying on his profession in or near *London*, on the 22d *July*, 1861, received from *W. Suggate* a power of attorney to receive the rents of the premises, which power of attorney had been executed by *W. Suggate*, without the defendant's knowledge or consent in *Australia*, on the 21st *May*, 1861. From and after the 22nd *July*, 1861, but not before, the defendant acted as agent for the real owner and receiver of the rents under the power of attorney. The rents were received once a year, at *Michaelmas*: the defendant received them at *Michaelmas*, 1861, for the year preceding that date.

On the 2d *February*, 1861, the Inspector of Nuisances for the *Wenhaston* district of the *Blything* Union, within which the premises are situated, reported in writing to the Board of Guardians of the Poor of the *Blything* Union, the local authority under the Nuisances Removal Acts, that there existed upon the premises certain nuisances. Nothing was done upon such report until the 19th *June*, 1861, on which day, Mr. *White*, the clerk to the guardians of the poor of the *Blything* Union, on their behalf as the local authority, laid an information against the owner of the premises, under the Nuisances Removal Act for *England*, 1855, "that in or upon the premises above mentioned the following nuisances existed, to wit, &c., and that the said nuisances were caused by the act or default of the owner of the said premises:" upon which information a summons was issued, dated the 19th *June*, 1861, and directed to the owner of the premises, calling upon him to appear at

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1863. the *Yoxford* Petty Sessions, on the 26th *June*, then instant, to answer the above complaint. The summons was served by being left upon the premises, and not upon the defendant; and on the 26th *June*, 1861, the case came on for hearing. No one appeared on behalf of the owner of the premises, and the service in manner aforesaid of the summons having been proved, and the evidence heard, an order was made directed to the owner of the premises, and dated on the 26th *June*, 1861.

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The order, which was in the form given in Schedule (E.) to the Act, after reciting the information and the proof of the service of the summons in manner aforesaid, proceeded as follows:—"Now, upon proof here had before us, that the nuisances so complained of do exist on the said premises, and that the same are caused by the act or default of the owner of the said premises: We, in pursuance of the said Act do order the said owner, within seven days from the service of this order or a true copy thereof according to the said Act," &c.: the order specified the acts necessary to abate the nuisances, and directed that, in the event of the order not being complied with, the Guardians of the Poor of the *Blything* Union should execute it themselves.

The order was served by being left on the premises, but was never served on the defendant; and, not having been obeyed by the owner of the premises, the plaintiffs directed their clerk to take the necessary steps to carry it out, and abate the nuisances, which was accordingly done. The necessary works were commenced on the 16th *July*, 1861, and finished on the 7th *September* following. Nothing more was done than was necessary to abate the nuisances. By order of the Guardians of

the Poor of the *Blything* Union, such clerk subsequently to the 22nd *July*, 1861, paid the tradesmen's bills for the above works, amounting altogether to 19*l.* 16*s.* 7*d.*, which, with 1*l.* 5*s.* 6*d.*, the costs of the order, and 10*s.* allowed to such clerk for superintending the works, made up 21*l.* 12*s.* 1*d.*, the amount sued for. This sum did not exceed one year's rack rent of the premises.

The defendant, who appeared at the trial in person, contended that he was not liable, as he was not the owner of the premises within the meaning of the Nuisances Removal Act for *England*, 1855, inasmuch as he did not receive the power of attorney till the 22nd *July*, 1861, after the order to abate the nuisances was made and executed.

The judge of the County Court decided against the objection, and a verdict and judgment were given for the plaintiffs for the sum of 21*l.* 12*s.* 1*d.*

The grounds of the determination of the judge were, that the defendant became, on the 22nd *July*, 1861, an owner within the meaning of The Nuisances Removal Act for *England*, 1855, as he then, at all events, became the receiver of the rents as agent for *W. Suggate*, the real owner, and he was such owner from that time until action brought, and at the time when the bills were paid; that under the circumstances, and by virtue of the provisions of sect. 19 of that Act, the sum of 21*l.* 12*s.* 1*d.* was a charge on the premises and payable by the person for the time being owner of the premises, within the meaning of the Act, and that the action was therefore well brought against the defendant.

By the interpretation clause, sect. 2, of stat. 18 & 19 *Vict. c.* 121., "the word 'owner' includes any person receiving the rents of the property in respect of which

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that word is used, from the occupier of such property on his own account, or as trustee or agent for any other person, or as receiver or sequestrator appointed by the Court of Chancery or under any order thereof, or who would receive the same if such property were let to a tenant."

By sect. 19, "All reasonable costs and expenses from time to time incurred in making a complaint, or giving notice or in obtaining an order of justices under this Act, or in carrying the same into effect under this Act, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; or if the order be made on the local authority, or if no order be made, but the nuisance be proved to have existed when the complaint was made or the notice given, then of the person by whose act or default the nuisance was caused; and in case of nuisances caused by the act or default of the owner of premises, the said premises shall be and continue chargeable with such costs and expenses, and also with the amount of any penalties incurred under this Act, until the same be fully discharged, provided that such costs and expenses shall not exceed in the whole one year's rack rent of the premises; and such costs and expenses and penalties, together with the charges of suing for the same, may be recovered in any county or superior Court."

The question for the determination of this Court was, Whether under the circumstances stated in the case the defendant was liable to repay the Guardians of the Poor of the *Blything* Union (the plaintiffs), the amount sought to be recovered in the County Court as money paid to the defendant's use, or at his request, as owner of the said premises.

Lush (*Stammers* with him), for the defendant.—The question is whether a person, who becomes owner of premises after an order of the local authority has been made, is responsible for the expenses of works executed under sect. 19 of The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121*. The power of attorney to receive the rents reached the defendant after the works had been commenced, and he did not begin to receive the rents until after the works had been completed; so that he was not owner within the interpretation clause, sect. 2. When the order was made there was an occupier of the premises who might have been served with a summons under sect. 12.

The Court then called upon

Bovill (*F. M. White* was with him), for the plaintiffs.—The order for these costs and expences is not made on any individual by name: under stat. 18 & 19 *Vict. c. 121. s. 2.*, it is made on the person who is owner at the time. And by sect. 35, whenever in any proceeding under the Act the owner or occupier of premises is mentioned or referred to, "it shall be sufficient to designate him as the 'owner' or 'occupier' of such premises, without name or further description." The power of attorney sent to the defendant to receive the rents was executed before the order was made. [*Crompton J.* The authority to receive the rents cannot operate until the person adopts or acts upon it: sect. 2 of the statute says nothing about authority.] Suppose the property were sold after one year's rent had been paid and before the next year's rent had accrued, and thereupon an agent was appointed to receive the rents, he would be the "owner" within sect. 2; otherwise the person who had

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ceased to receive the rents would be liable. [*Cockburn* C. J. referred to sect. 18.] Sect. 19 makes the expenses a charge on the property, but there is no clause enabling the local authority to recover them against the owner, except in an action under this section. [*Crompton* J. By sect. 14 the person not obeying an order for abatement of a nuisance is liable to a penalty of 10s. per day during his default.] There is a limitation of the costs and expences, so that the purchaser cannot be subject to an incumbrance exceeding one year's rack rent. [*Crompton* J. The plaintiffs must go the length of saying that the defendant was liable to execute the works ordered to be done before he received authority from the owner to receive the rents.] At the time when the money was paid by the plaintiffs, and this action was brought by them, the defendant had received the rents.

COCKBURN C. J. I am of opinion that our judgment ought to be for the defendant. Under stat. 18 & 19 *Vict. c. 121.* the premises are to continue chargeable with the costs and expences incurred, but no means are provided for enforcing the charge against them, which would be the more appropriate remedy: the present is a *casus omissus*. When there has been default in the abatement of a nuisance in obedience to an order of the local authority, they are empowered to execute the necessary works and charge with the expences the person on whom the order was made. But that does not authorize them to fix with a personal liability an individual who has become owner subsequently to the making of the order; which is the position of this defendant. The whole procedure under sect. 19 has reference to the person who was owner at the time when the order was

made, or by whose act or default the nuisance was caused. The defendant was neither; and therefore is not liable. Whatever may be the meaning of the provision that the premises "shall be and continue chargeable,"—whether that they shall be chargeable in equity, or that judgment obtained against the owner shall be available against a subsequent purchaser, it is sufficient to say that no personal liability is imposed on this defendant.

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CROMPTON J. I am of the same opinion. It is unnecessary to decide whether the definition of "owner," in sect. 2, means the person in receipt of the rents at the time when the order is made; but it is clear that the defendant did not receive the rents, as agent, until he was in possession of authority from the owner to receive them, and had assented to act under it. Therefore he was not agent at the time when the order was made, nor until the greater part of the works had been executed. And sect. 19 contemplates proceedings being taken against the person who is owner at the time of the making of the order. The County Court judge relied on the words which make the premises chargeable with the costs and expences; but the only mode provided of recovering them is by an action, or by proceedings before justices, who have the power of apportioning them between the persons by whose act or default the nuisance arose; and that action, as is provided in the section, must be an action for money paid for the use and at the request of the person on whom the order was made, or the person by whose act or default the nuisance was caused; and the defendant was neither. It could not have been intended to make a difference in the liability in the two cases. If it had been intended to impose a

1863. personal liability, there would have been more than a charge on the premises. There is no provision for reaching an owner in *Australia*.

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MELLOR J. concurred.

Judgment for the defendant.

Tuesday,
January 20th.

FALKNER and others *against* EARLE and others.

Custom.
Ports in the
United States
of North
America.
Evidence.

The custom in the trade at *Liverpool* that, in the absence of special stipulation, three months interest or discount is deducted from freights payable under bills of lading, on goods coming from all ports in the United States of *North America*, was applied to ships coming from the ports of *Texas*, when it was admitted into the confederacy of the *United States* in 1846; and on the first shipment from *California* for *Liverpool*, after it became one of the *United States* in 1848, the custom was submitted to without dispute. The same custom applies to all ships coming from the ports of *British North America* and from *South America*. In the case of vessels arriving from the *East Indies*, *China* and *Australia*, the custom is to allow sixty days discount, and of vessels from the rest of the world not before mentioned to make no allowance. Held that there was evidence from which a jury might infer that the custom as to shipments from the United States of *North America* extended to ports in *California*.

THE following case was stated, without pleadings, by order of a Judge.

The plaintiffs are shipowners and agents at *Liverpool*, and they have also a house at *San Francisco*, in *California*. The defendants are merchants at *Liverpool*. On the 30th *November*, 1860, the plaintiffs' house at *San Francisco* chartered the *British* ship *St. Helena*, then lying at the port of *San Francisco*, and bound for *Liverpool*, and shipped on board, as part of her cargo, 14,340 sacks of wheat, for which the master signed a bill of lading, by which the wheat was to be delivered at the port of *Liverpool* "unto order or to assigns, he or they paying freight for the said wheat at the rate of 2*l.* 12*s.* 9*d.* per ton of 2240 lbs., without primage, and average accustomed." The bill of lading was forwarded to the defendants, indorsed to them, and, on the arrival of the vessel

in *Liverpool*, the defendants claimed and received the 14,340 sacks as indorsees and holders of the bill of lading. On the wheat being delivered, a note was rendered by the agents for the plaintiffs to the defendants, stating the amount due for the freight to be 1657*l.* 1*s.* 1*d.* The defendants paid the plaintiffs 1634*l.* 3*s.* on account of the freight, but refused to pay the balance 22*l.* 18*s.* 1*d.* (being three months discount) on the sole ground that, by the custom of *Liverpool*, they were entitled to a deduction of three months discount from the freight.

It is admitted that, according to the usual custom prevailing amongst merchants and shipowners at the port of *Liverpool* up to the time when *California* became a part of the United States of *North America* as hereinafter mentioned, in the absence of special stipulation, three months interest or discount is deducted from freight payable under bills of lading on goods coming from all ports in the United States of *North America*, whether such freights are paid by the shippers, the consignees named in the bill of lading, or by the assignees of the bill of lading.

Many years ago a practice was introduced, and now prevails, of stamping on the bills of lading on shipments from *New York* and all parts to the North of and including *Baltimore* the words "freight payable in cash, without discount," and the deduction is not made in such cases.

There have been only very recently any shipments direct from *California* to the port of *Liverpool*. The first vessel was *The Harvey Birch*, which arrived in *Liverpool* in November, 1855, and the freight of this vessel was paid and received less three months discount without dispute. The next vessel to *The Harvey Birch* was *The St. Helena*, which is the subject of the present

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case. Several vessels have since arrived from *California*, but the claim for discount has not been allowed, but awaits the decision in this case.

The territory comprised in the present state of *California* formerly formed part of the Republic of *Mexico*, at which time there was no shipment of goods from thence to the port of *Liverpool*. It was afterwards conquered by and ultimately ceded to the *United States* in 1848, and at first formed a territory belonging to the *United States*, and was afterwards, in 1850, formed by an Act of the Congress of the *United States* into a sovereign state, and became and is one of the states of the *United States of North America*.

In 1846 the territory called *Texas*, which also had been part of the Republic of *Mexico*, was admitted as a sovereign state into the Confederacy of the *United States*.

From that time it is admitted that the above custom has always applied to ships coming from the ports of *Texas*, but it is not known whether it had prevailed previously or not. The same custom applies to all ships coming from the ports of *British North America*. The same custom applies to all ships coming from *South America*. In the case of vessels arriving from the *East Indies*, *China* and *Australia*, the custom is to allow sixty days discount, and of vessels from the rest of the world not before mentioned in this case to make no allowance.

The plaintiffs contend that, under the above circumstances, the aforesaid custom does not prevail as to the payment of freight from ports in the State of *California*. The defendants contend that, under the above circumstances, the aforesaid custom, prevailing with respect to freight from all other ports of the *United States* to the port of *Liverpool*, prevails or is binding with respect to

the payment of freight on cargoes from ports in the State of *California* to the port of *Liverpool*.

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The Court is to be at liberty to draw all inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the Court are: First. Whether the custom of the port of *Liverpool* to deduct three months discount from freight is binding or extends as to freight on cargoes from ports in the State of *California*. Secondly. Whether the plaintiffs, under the circumstances of the case, are entitled to recover the said sum of 22*l.* 18*s.* 1*d.* from the defendants.

Milward, for the plaintiffs.—This custom in the trade at *Liverpool*, of deducting three months interest or discount from freight, payable under bills of lading, on goods arriving from certain ports, was held good in *Brown v. Byrne* (a). [He also cited *Hall v. Janson* (b) as explaining the marginal note in *Brown v. Byrne*.] The question here is whether the custom is shewn to exist in fact as regards shipments from *California*. The only evidence of that is that one ship had arrived in *Liverpool* from *California* before *The St. Helena*, and in that instance the deduction was submitted to without dispute. If the custom applies to *California*, the plaintiffs will be deprived of a right by virtue of an Act of the Congress of the *United States*.

Mellish (*Quain* with him), who appeared for the defendants, was not called upon.

COCKBURN C. J. I think that there is evidence on which a jury ought to find that the custom applies to

(a) 3 *E. & B.* 703.

(b) 4 *E. & B.* 500. 510.

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ships coming from ports in *California*. The admission that the custom has applied to ships coming from the port of *Texas* is strong evidence in favour of its extending to all places as soon as they become ports of the United States of *North America*.

CROMPTON and MELLOR JJ. concurred.

Judgment for the defendants.

*Tuesday,
January 27th.*

STADHARD *against* LEE and another.

*Construction
of contract.
Condition
precedent.*

. Declaration for work done. Plea, that the work was done under a contract by which the plaintiff agreed to execute the work to the satisfaction of the defendants or their agent, with a proviso that if the works should not proceed as rapidly and satisfactorily as required by the defendants or their agent, they should have full power to enter upon and take possession of the works, and pay whatever number of men might be left unpaid by the plaintiff, and might set to work whatever number of men they might consider necessary, and that the amount so paid, and the costs of the men so set to work, should be deducted from any moneys that might be due to the plaintiff; and that the defendants, having acted on the proviso, claimed to deduct the costs incurred by them in satisfaction of the plaintiff's demand. Replication, that the works did proceed as rapidly and satisfactorily as the defendants reasonably and properly could require, and that the defendants and their agent unreasonably, improperly and capriciously required the works to proceed as in the plea alleged. Held, on demurrer, that the replication, which stopped short of alleging mala fides in the defendants, was no answer to the plea.

DECLARATION for work and labour done, and materials.

Fourth plea to the plaintiff's claim, so far as relates to work done. That the work was done under a certain written agreement, made and entered into by and between the defendants and the plaintiff, in the words and figures following, that is to say :—"Memorandum of agreement, made this 25th *April*, 1862, between *William Lee* and *William Bowles*, of &c., of the

one part, and *Charles Stadhard, &c.*, of the other part : The said *C. Stadhard* hereby agrees to provide and perform all labour, pay all workmen's wages necessary for excavating the work for such portion of the Southern High Level Main Drainage Works, situate between rear of houses west of *Denmark Hill* and *Cold Harbour Lane*, as may be required by the said *W. Lee* and *W. Bowles*, or their agent, to be done and performed, and to fill the earth into waggons, carts or barrows, and tip, fill in and properly ram a sufficient portion of the earth over the excavated portion of the sewer, and run and tip to spoil, as may be directed, the remaining portion of surplus, and also properly timber and protect the sides of the trench, with cross struts, walls, poling boards and runners, and to strike and convey and reset the same ; the works to be done in such quantities and at such times as the said *W. Lee* and *W. Bowles*, or their agent, may direct, for the sum of one shilling and sixpence per cubic yard, which quantity is to be ascertained by measurement of the trench excavated. And the said *C. Stadhard* hereby agrees to execute the above mentioned work to the entire satisfaction of the engineer and clerk of works appointed by the Metropolitan Board of Works as well as to the satisfaction of Messrs. *Lee* and *Bowles* or their agent. Provided that if the said works shall not proceed as rapidly and satisfactorily as required by the said *W. Lee* and *W. Bowles*, or their agent, they shall have full power to enter upon and take possession of the said works, and pay whatever number of men may be left unpaid by the said *C. Stadhard*, and may set to work whatever number of men the said *W. Lee* and *W. Bowles*, or their agent, may consider necessary, and the amount so paid, and the costs of the

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1863. men so set to work as last mentioned, shall be deducted
STADHARD from whatever moneys may be due to the said *C. Stadhard*,
V. and the amount of any monies that may be due to the
LEE. said *C. Stadhard* shall be ascertained by Mr. *J. B.*, whose
decision shall be final. And the said *W. Lee* and *W. Bowles*
agree to pay to the said *C. Stadhard* by weekly payments
from measurement of work done, at the rate of 95 per
cent. on the total amount, the remaining 5 per cent.
being retained by the said *W. Lee* and *W. Bowles* until
the completion of the work herein contracted for.”
Averment, that the works in the agreement men-
tioned, while proceeded with by the plaintiff, did not
proceed as rapidly and satisfactorily as required by the
defendants and their agent ; and thereupon the defend-
ants entered upon and took possession of the works, and
paid certain men who had been employed by the plain-
tiff to do the works and were left unpaid by the plaintiff,
and set to work a number of men whom the defendants
and their agent considered necessary to finish the works,
at great costs to the defendants ; and that the moneys
so paid, and the costs, equalled the plaintiff’s claim for
such work as aforesaid, which moneys and costs have
never at any time been paid or satisfied by the plaintiff
to the defendants, but have always remained liable and
still remain liable to be deducted, and are hereby
deducted, from the amount of the moneys due to the
plaintiff in respect of his said last mentioned claim.
Averment of performance of conditions precedent.

Replication to the fourth plea : that the works, while
proceeded with by the plaintiff as in the fourth plea
mentioned, did proceed as rapidly and satisfactorily
as the defendants, or their agent, reasonably required,
and the works then did proceed as rapidly and satisfac-

torily, according and pursuant to the agreement, as the defendants reasonably and properly could require; and the defendants and their agent unreasonably, improperly and capriciously required the work to proceed as in the fourth plea alleged.

Demurrer, and joinder therein.

The demurrer was argued (*January 20th*) before COCKBURN C. J., CROMPTON and MELLOR JJ.

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Quain, for the defendants.—The replication is bad for attempting to put in issue the reasonableness of the requirement of the defendants as to proceeding with the works, whereas the contract gives them an absolute discretion in such requirement. The proviso that, if the works shall not proceed as rapidly and satisfactorily as required by the defendants, they shall have power to enter upon the works and set to work whatever number of men they may consider necessary, cannot be construed to mean if the works shall not proceed “as rapidly and satisfactorily as may be reasonably required” by the defendants. The contract reserves to the defendants an absolute power of determining whether the works proceeded with sufficient rapidity and to their satisfaction; and the plaintiff has assented to that reservation, trusting that nothing unreasonable or impossible will be required by them. If a man contracts to do what is unreasonable or impossible, as, for instance, to carry goods at the rate of 100 miles an hour, he must perform the contract, or be liable to damages. Where a person contracts to do work to the satisfaction of a surveyor, the certificate of the surveyor is necessary to entitle him to recover; and he cannot recover without it, even if it is withheld fraudulently; *Scott v.*

1868. *The Corporation of Liverpool (a), Milner v. Field (b).*
 STADHARD [Crompton J. Those were cases in which a third
 V. person was appointed to certify whether the work
 LEE was well done, and his certificate was held to be a
 condition precedent to the right to recover the price
 of the work ; and we acted upon them in a case during
 the present Term of *Westwood v. The Secretary of State
 for India*, though we also held that the right of the de-
 fendant to insist on the penalty did not arise, the engineer
 having ordered extras which made it impossible to per-
 form the contract within the time ; *Holme v. Guppy (c)*
 is to the same effect ; but in *Parsons v. Sexton (d)*,
 where the work was to be done to the satisfaction of
 the other party, it seems to have been thought that it
 would be sufficient if the work was such as ought
 reasonably to have satisfied him.] *Parsons v. Sexton*
 was an action upon an agreement by which the plaintiff
 was to provide and erect a specific engine for a given
 sum, and which contained a stipulation that the last
 instalment should be paid by the defendant on his being
 satisfied with the work, and *Wilde C. J.*, in delivering
 the judgment of the Court, said, p. 909, " It appears
 to us that this stipulation refers to the work of the
 plaintiff in *erecting* the engine, and not to the engine
 itself ; and no question was left to the jury as to whether
 that work was such as ought reasonably to have satisfied
 the defendants ; they relied on dissatisfaction with the
 engine, and not with the work of the plaintiff in erecting
 it : " but that was merely a dictum, and not on the
 principal point in the case. The nature of the works

(a) 1 *Giff.* 216 ; affirmed on appeal, 3 *De G. & J.* 334.

(b) 5 *Exch.* 829.

(c) 3 *M. & W.* 387.

(d) 4 *C. B.* 899.

in the present case renders it important that they should be executed with speed.

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Shaw, for the plaintiff.—The Court will not give an unreasonable construction to a contract unless the words used by the parties force it to do so. The proviso in question is not to be construed as binding the plaintiff to do more than to perform the work as rapidly and satisfactorily as could reasonably and properly be required. The replication therefore sufficiently answers the plea by alleging that this was done, and that the defendants unreasonably, improperly and capriciously required the works to proceed more rapidly. This case is like *Dallman v. King* (a), where there was a stipulation by the lessee to lay out 200*l.* in repairs to be approved of by the lessor, and the lessee was to be allowed to retain that sum out of the first year's rent; and it was held that the lessor's approval was not a condition precedent to the lessee's retaining the rent, the Judges saying that it could not have been intended that the lessor might capriciously withhold his approval. In *Andrews v. Belfield* (b), the plaintiff having contracted to build a carriage in accordance with the taste and convenience of the defendant, it was held that the defendant was entitled to reject it if it did not fulfil that condition, assuming always that the defendant acted bonâ fide, and not capriciously. [He also relied on *Parsons v. Sexton* (c).] In *Braunstein v. The Accidental Death Insurance Company* (d), where, in a policy of insurance by a Company against bodily injury, it was provided that before payment of the sum insured proof satisfactory to

(a) 4 *Bing. N. C.* 105.(b) 2 *C. B. N. S.* 779.(c) 4 *C. B.* 899.(d) 1 *B. & S.* 782.

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the directors of the Company should be furnished by the claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim, it was held that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously, require; and *Crompton J.*, p. 797, referred to the "general rule, that when it is agreed that an act is to be done to the satisfaction of a party it must be understood to mean *reasonably* to his satisfaction." [*Cockburn C. J.* An insurance Company cannot be allowed to frustrate the object of a policy by refusing to be satisfied with reasonable evidence of the death of the person whose life has been insured.] The proviso in question imports penal consequences, and therefore is to be construed strictly. [*Mellor J.* The only penalty to which the plaintiff is subject is that the defendants may enter upon the works and employ additional workmen.]

Quain was not called upon to reply.

Cur. adv. vult.

COCKBURN C. J. (*Jan. 27th*), delivered the judgment of the Court.

The question for our decision in this case turns on the construction to be put on a clause in the agreement between the parties to this action, as set forth in the fourth plea.

In a contract in respect of work to be done at so much per cubic yard by the plaintiff *Stadhard* for the defendants, who are contractors for certain public works connected with the sewerage of the metropolis, *Stadhard*

agrees to execute the work to the entire satisfaction of the engineer and clerk of the works appointed by the Metropolitan Board of Works, as well as to the satisfaction of the defendants or their agent; and the defendants stipulate that, if the said works shall not proceed as rapidly and satisfactorily as required by the defendants or their agent, they shall have full power to enter upon and take possession of the works, and pay whatever number of men may be left unpaid by *Stadhard*, and may set to work whatever number of men they may consider necessary; and that the amount so paid, and the costs of the men so set to work, shall be deducted from whatever moneys may be due to *Stadhard*. The defendants, having acted on the proviso in question, as averred in the plea, claim to deduct, in satisfaction of the plaintiff's demand, the costs incurred by them. To this plea the plaintiff replies that the works did proceed as rapidly and satisfactorily as the defendants reasonably and properly could require, and that the defendants and their agent unreasonably, improperly and capriciously required the works to proceed as in the plea is alleged.

The question is, whether this replication is a sufficient answer to the plea. We are of opinion that it is not.

We quite agree that stipulations and conditions of this kind should, where the language of the contract admits of it, receive a reasonable construction, as it is to be intended that the party in whose favour such a clause is inserted meant to secure only what was reasonable and just; and we therefore entirely accede to the propriety of the decision in *Dallman v. King* (a). But

(a) 4 Bing. N. C. 105.

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we are equally clear that, where from the whole tenor of the agreement it appears that however unreasonable and oppressive a stipulation or condition may be one party intended to insist upon and the other submit to it, a Court of justice cannot do other than give full effect to the terms which have been agreed upon between the parties. It frequently happens the competition which notoriously exists in the various departments of business, that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and oppressive. From the stringency of such terms escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning. But the duty of a Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement; though, where the language of the contract will admit of it, it should be presumed that the parties meant what was reasonable, yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

Now, on carefully considering the contract between the parties, we are satisfied that the intention was that the defendants, if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute and unqualified power to put on additional hands and get the work done, and deduct the cost of the contract-price payable to the plaintiff, and that if these terms had been ever so unreasonable, we should have felt bound to give effect to them, and to hold so long as the defendants were acting bona fide.

an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded and unreasonable, they were entitled to insist on the condition, and consequently that the replication, which only alleges that their dissatisfaction was unreasonable and capricious, but which stops short of alleging mala fides in the defendants in acting as is stated in the plea, is insufficient.

We feel, however, bound, in justice to the defendants, to add that we do not consider the stipulation in question unreasonable. It amounts only to this, that the defendants, who are the principal contractors for a great public work, and who are themselves probably under stringent terms to complete the undertaking with dispatch, insist, on employing the plaintiff to do a subordinate portion of the work, that if such work should not progress as rapidly as they may desire they shall be at liberty to put on more hands, and deduct the cost of them from the contract price, still leaving to the plaintiff the benefit of the contract.

Independently, however, of this, thinking the effect of the proviso clear, we are of opinion that the replication affords no sufficient answer to the plea, and our judgment on the demurrer will therefore be for the defendants.

Judgment for the defendants.

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*Saturday,
January 17th.*

MORLEY and others, appellants, GREENHALGH,
respondent.

*Cruelty to
animals.
12 & 13 Vict.
c. 92. s. 3.
Cockfighting.
Aiding and
assisting.*

Stat. 12 & 13 *Vict. c. 92. s. 3.* enacts, that every person who shall keep or use any place for the purpose of fighting or baiting any bull, &c., cock, or other kind of animal, whether of domestic or wild nature, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep or use such place; provided that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; "and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, &c., cock, or other animal as aforesaid," shall be liable to a penalty not exceeding 5*l.*: Held, that it is not an offence to assist at the fighting of cocks unless in a place specially kept or used for that purpose.

CASE stated by justices of the peace, under stat.
20 & 21 *Vict. c. 43.*

Upon an information preferred by the respondent, under stat. 12 & 13 *Vict. c. 92.*, in which it was alleged that the appellants, on &c., in the township of *Woolley*, in the West Riding of the county of *York*, "did then and there assist in a cockfight, and act in the management of a certain place then and there being used for the purpose of fighting cocks, to wit, by then and there setting two cocks to fight on the day and year aforesaid, and at the place aforesaid, against the form of the statute in such case made and provided," the appellants were convicted of that offence, and adjudged to forfeit and pay the sum of 1*l.* each, and also the sum of 10*s.* each for costs.

At the hearing of the information, it was proved, on the part of the respondent, that, on the day stated in the information, at a stone quarry belonging to *Godfrey Wentworth, Esq.*, in the township of *Woolley*, several

cocks were fought in the presence of upwards of 100 persons. That one of the cocks was taken out of the ring by the appellant, *Morley*, and that he was in the ring at the time the cocks were fought; and that, on the appearance of some police officers in disguise, *John Peel*, another of the appellants, was seen running away with a cock. It was also proved that the other appellants who were there took no other part than by throwing stones at the police officers, and preventing them from approaching the quarry at the time the fights were going on. But it was not proved that in any other instance had cocks been fought there.

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It was contended, on the part of the appellants, that there was no offence committed within the intent and meaning of stat. 12 & 13 *Vict. c. 92. s. 3.*, inasmuch as that section only applied to encouraging, aiding or assisting at the fighting of cocks in any place regularly kept or used for that purpose as mentioned in its first clause, so as to subject the keepers of such place to the penalty fixed by the section, and that there was no evidence to shew that the stone quarry was a place so kept or used.

The justices were of opinion that the appellants did resort to the quarry with the intention of causing the cocks to fight together there, and that they did encourage, aid and assist at the fighting of the cocks at the said place then and there being used for the purpose of fighting cocks, and did use the place for such fighting. They were also of opinion that the quarry was a place within the meaning of stat. 12 & 13 *Vict. c. 92. s. 3.*, inasmuch as the last part of the section applied to any place, and was not limited in its construction to a place specially kept for the purpose of cockfighting, &c.

They accordingly convicted each of the appellants of

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the offence set forth in the conviction, which was in the same terms as the information.

The question for the opinion of this Court was, whether it is an offence, within the intent and meaning of stat. 12 & 13 *Vict. c. 92. s. 3.*, to assist at the fighting of cocks, and act in the management of any place then and there being used for the purpose of fighting cocks, as set forth in the information, or only in a place specially kept for that purpose.

Hawkins, for the respondent.—Stat. 12 & 13 *Vict. c. 92. s. 3.*, enacts: “Every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding five pounds for every day he shall so keep or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds for every such offence.” Either of the matters charged in the information would support the conviction.

First. The appellants were acting in the management of a place used for the purpose of fighting cocks, though it was not kept for that purpose. In order to bring a case within the first clause of sect. 3, it is not necessary

that the place in which the fighting or baiting is should be kept or habitually used for that purpose. A man, by advertising a place for fighting or baiting animals, would keep a place for the purpose though it had never been so used. [*Wightman J.* The word "use" may have been introduced to include the person who is not lessee of the place.] Suppose a man went about the country and hired fresh places for fighting cocks, he would be within the enactment, though each place was used only once. [*Crompton J.* A man who opened a place for fighting cocks to the public for one day would keep or use the place within this Act; but there must be some person who keeps the place: there is no keeper of this stone quarry.]

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Secondly. The appellants were guilty of the offence described in the last clause of sect. 3. In *Clark*, appt., *Hague*, respt. (a), it was held that the offence of assisting at the fighting of cocks could only be committed in a place regularly kept for that purpose, as mentioned in the former part of the section; but the object of the statute was to prevent cruelty to animals in every place. The words "as aforesaid," in the last clause, do not refer to the place but to the description of the animal in the first clause, viz. "other kind of animal, whether of domestic or wild nature." [*Wightman J.* The first clause creates an offence with reference to the place, because it imposes a penalty of 5*l.* for every day the person keeps or uses or acts in the management of the place. *Crompton J.* The answer to the argument which has been very ingeniously put is, that the last clause of the section is part of the proviso in which the Legislature say, first, who is to be deemed "keeper" of the

(a) 2 *E. & E.* 281.

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place in which the fighting or baiting is, and then impose a penalty on any person who encourages, aids or assists in the fighting or baiting in those places. *Wightman J.* Sect. 2 is a general enactment against cruelty, and extends to "any animal." The interpretation clause, sect. 29, which restricts the word "animal" to domestic animals, shews that the setting animals to fight would not come within section 2. [*Crompton J.* The Legislature did not intend to reach *every* cruelty to animals.]

Keane, contra, was not called upon.

WIGHTMAN J. The present is substantially the same case as *Clark*, appt., *Hague*, respt. (a), in which the Court delivered a considered judgment, and decided that the offence charged, which was the same as that in the present information, was not within stat. 12 & 13 *Vict. c. 92. s. 3.* It is too much to ask us to overrule the decision in that case; and I am disposed to think that it is right.

CROMPTON J. The decision in *Clark*, appt., *Hague*, respt. (a), is in point; and, although at one time I was disposed to agree with Mr. *Hawkins* in his contention, upon consideration I think that the enactment and proviso, being both in one section, were intended to apply to the same subject matter. If it were a new question I should wish for time to consider.

MELLOR J. At one time I thought that the mere act of setting cocks to fight was an offence within stat.

(a) 2 *E. & E.* 281.

12 & 13 *Vict. c. 92. s. 3.*; but, on consideration, the decision in *Clark*, appt., *Hague*, respt., appears to me to be right. Sect. 3 enacts, that any person who shall keep or use or act in the management of any place for fighting or baiting animals shall be liable to a penalty, and by way of proviso, in order to obviate the difficulty of proving who such person was, defines that every person who receives money for the admission to any place kept or used for any of the purposes aforesaid "shall be deemed to be the keeper thereof;" and then adds, that every person who shall encourage, aid or assist at the fighting or baiting of any bull, &c., "or other animal as aforesaid," shall be also liable to a penalty. Looking to the frame of the section, and considering also that it is a penal enactment, I think that the words "as aforesaid" mean "in any place kept or used for any of the purposes aforesaid."

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Conviction quashed (a).

(a) See the next case.

BUDGE, appellant, PARSONS, respondent.

[Friday, February 13th.]

For head note, see preceding case, p. 374.

CASE stated by justices of the peace under stat. 20 & 21 *Vict. c. 43.*

Upon an information preferred by the respondent, under stat. 12 & 13 *Vict. c. 92.*, in which it was alleged that the appellant, on &c., at the parish of *Walkhampton*, in the county of *Devon*, "did encourage and assist" at the fighting of two cocks which then and there fought

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in a certain field there situate, in the occupation of one *Robert Peter*, "such field being then and there used for the purpose of fighting cocks" therein, contrary to the statute, the appellant was convicted of the offence, and adjudged to pay a penalty of 10*s.*, and 9*s.* costs.

At the hearing of the information it was proved that seven battles were fought, one after the other, in the same field, by different cocks armed with artificial spurs, and brought to the scales and weighed, and that the spectators dispersed after each battle, and again formed a ring.

The appellant's attorney admitted the fact of the cocks having been fought, and that the appellant assisted at the fighting of them, but contended that no offence had been committed under the statute, inasmuch as it had not been proved that cocks had ever been fought in the same field before the day in question, and that therefore the field was not a place used for the purpose of fighting cocks within the meaning of stat. 12 & 13 *Vict. c. 92. s. 3.*

The justices being of opinion that the persons assembled in the field (many of whom were shewn to belong to towns and places many miles distant from the field and from each other) had met there for the purpose of cockfighting, and that the appellant did encourage, aid and assist at the fighting of such cocks, and that the field in question was a place then used for the purpose of fighting cocks therein within the meaning of the statute, gave their determination against the appellant in manner before stated.

The question for the opinion of the Court was, whether the field in question was to be regarded for the time being as a place used for the purpose of fighting cocks within the meaning of the statute, so as to

render the appellant liable to the penalty for encouraging, aiding and assisting at the fighting of cocks as aforesaid.

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Lopes, in support of the conviction.—There was reasonable evidence before the justices that the cockfighting was in a place for the time being kept and used for that purpose: it was not a chance place, because persons were invited to it. [*Crompton J.* In *Morley*, appt., *Greenhalgh*, respt. (a), we held that, by virtue of the words “as aforesaid,” the proviso in stat. 12 & 13 *Vict. c. 92. s. 3.* had reference to the first clause of the section, and therefore the cockfighting must be in a place kept or used for the purpose.] In *Clark*, appt., *Hague*, respt. (b), the Court said, “We do not wish to be understood as confirming what appears to have been the opinion of the justices, that no penalty can be incurred unless the animals are baited in a place, to use the phrase in the case, ‘regularly kept for that purpose.’” [*Wightman J.* Receiving money for the admission of persons to the place might be evidence that it was a place kept for cockfighting. It might be a place kept for the purpose, though no particular person was proved to keep it.] In *Morley*, appt., *Greenhalgh*, respt. (a), *Crompton J.* said, ante, p. 377, that a man who opened a place for fighting cocks to the public for one day would keep or use the place within sect. 3. [*Crompton J.* I adhere to that, because a man must begin to keep the place on some day. *Mellor J.* Sect. 3 refers to three classes of persons: the last clause in the section is to be read with the enacting part, and not as a separate proviso. *Crompton J.* There is no substantial

(a) See the preceding case.

(b) 2 *E. & E.* 281. 286.

1863. difference between the present case and *Morley*, appt.,
 BUDGE *Greenhalgh*, respt. (a): the only difference is that in
 v. the present case the cocks were fighting for a longer
 PARSONS. time.] If this conviction cannot be supported, a person
 may go from day to day from one field to another and
 fight cocks and not be within the statute, though he
 has invited persons to come and be present. [*Wight-*
man J. But the owner of the field could not do so.]

H. T. Cole, contrà, was not called upon.

PER CURIAM. (WIGHTMAN, CROMPTON and MELLOR JJ.)

Conviction quashed (b).

(a) See the preceding case.

(b) See the next case.

[Friday, Fe-
bruary 13th.]

BUDGE, appellant, PARSONS, respondent.

*Cruelty to
animals.
12 & 13 Vict.
c. 92. ss. 2, 29.
Cock.
Cockfighting.*

Stat. 12 & 13 *Vict. c. 92. s. 2.* enacts that if any person shall "cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal," he shall be subject to a penalty; and, by sect. 29, "the word 'animal' shall be taken to mean any horse, &c., dog, cat, or any other domestic animal." Held,

1. That, by virtue of sect. 29, a cock was an 'animal' within sect. 2.
 2. That a person who set his cock to fight another after the other had been disabled by its thigh being broken, committed an offence within that section.

CASE stated by justices under stat. 20 & 21 *Vict. c. 43.*

Upon an information preferred by the respondent against the appellant, under stat. 12 & 13 *Vict. c. 92. s. 2.*, charging that the appellant, on &c., at the parish of *Walkhampton*, in the county of *Devon*, "did cause and

procure to be cruelly ill-treated, abused, and tortured a certain cock," contrary to the statute in such case made and provided, the appellant was convicted of the offence, and adjudged to pay a penalty of 10*s.*, with 7*s.* 6*d.* costs.

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At the hearing of the information, evidence was given that, on the day mentioned in the information, the appellant, with about 100 other persons, was in a field occupied by *Robert Peter*, and put seven cocks to fight with other seven cocks in succession: five cocks were killed. On one occasion the appellant and a man called *Collocott* had one cock each which they put to fight; the cocks had artificial spurs, apparently steel, fixed to their legs; the second or third round *Collocott's* cock had its thigh broken; after that, *Collocott* several times took up his cock, and the appellant put his to fight with it; about ten minutes after *Collocott's* cock was killed by the other. The appellant had encouraged, aided and assisted at the fighting of the six other pairs of cocks on the same day and in the same place.

The appellant's attorney contended: First. That the appellant had been guilty of no offence under the statute; that the placing the cocks to fight, which it was their nature to do, was not a causing and procuring the cock in question to be cruelly ill-treated, abused and tortured within the meaning of the statute. Secondly. That if the appellant had been guilty of any offence, it was included under another charge which the justices had just heard and determined, viz., of having encouraged, aided and assisted at the fighting of two cocks on the same day in the same field, such field being then and there used for the purpose of fighting cocks therein (a).

(a) See the preceding case.

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 v.
 PARSONS.

The justices considered that the appellant had been guilty of the offence of causing and procuring the said cock to be cruelly ill-treated, abused and tortured within the meaning of the statute.

The question for the decision of the Court was, whether the appellant, under the facts and circumstances detailed, had been rightly convicted or otherwise.

Lopes, in support of the conviction.—By stat. 12 & 13 *Vict. c. 92. s. 2.*, “if any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l.* ;” and by the interpretation clause, sect. 29, so far as such meaning is not excluded by the context or by the nature of the subject-matter, “the word ‘animal’ shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.” This cock was reduced into possession, and so became a domestic animal ; and therefore, by the aid of the interpretation clause, sect. 29, was an “animal” within sect. 2. The word “animal” applies to birds as well as quadrupeds. At the end of sect. 3 the word “cock” is followed by the words “or other kind of animal.” [*Crompton J.* That section applies to a cock, whether domestic or wild : sect. 2 was meant to exclude animals which are animals of sport.] The facts sufficiently shew that the cock was ill-treated by the appellant.

H. T. Cole, contra.—First. The conviction is insuffi-

cient for not alleging ill-treatment of an animal. [*Wightman J.* We must take notice that a cock is an animal, and we must assume that the cock in question was alive, because a dead animal could not be tortured.]

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Then a cock is not an "animal" within stat. 12 & 13 *Vict. c. 92. s. 2.*, according to the meaning given to that word in the interpretation clause, sect. 29, which applies wholly to quadrupeds and does not mention any bird, though it does mention a cat. [*Mellor J.* The enumeration in sect. 29 does not exhaust all quadrupeds. The cruelty intended to be prevented by the statute is as great when practised upon a pigeon, turkey, or other domestic bird, as upon a domestic quadruped. *Wightman J.* The cruelty intended by the statute is the unnecessary abuse of any animal. *Mellor J.* Over-driving is among several other words. Suppose a cock had not been mentioned by name in sect. 3, would it not have been included under the word "animal" in that section?] Further, the setting of animals to fight is not cruelty within the meaning of sect. 2; otherwise sect. 3 would not have been necessary. [*Mellor J.* Sect. 2 applies to causing or procuring an animal to be ill-treated, as well as to those who ill-treat it with their own hands.]

Secondly. The appellant has been convicted twice. [*Wightman J.* One of the convictions is a nullity, having been quashed (a).]

WIGHTMAN J. The question is, whether the appellant was guilty of an offence within sect. 2 of stat. 12 & 13 *Vict. c. 92.*, which is intituled "An Act for the more

(a) See the preceding case.

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effectual prevention of cruelty to animals." [His Lordship stated the facts and the terms of the conviction.]

The first point is, whether this cock was an "animal" within the meaning of sect. 2. The terms of the section are large enough to include a cock and any other animal whatsoever. [His Lordship read it.] Then follows the 3d section, which makes it penal to keep or use any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature. The word "cock" is found in this section, but not in section 2; and when the word is used in sect. 3, it is followed by the words "or other kind of animal, whether of domestic or wild nature." The present conviction, however, is on sect. 2, which does not contain those or similar terms; while the interpretation clause, sect. 29, explains that the word "animal" is to be taken to mean "any horse, &c., or any other domestic animal." It is said that a cock does not come within the description of a domestic animal, and that a domestic animal, in sect. 29, must be of the same kind as those previously enumerated, and must be a quadruped. But fowls and poultry are within the term "domestic animal," as used in that section, as much as bulls, oxen, cows, and other animals which are mentioned by name. And the intention of the Legislature in this statute seems to have been to draw a distinction between such animals as are of a domestic nature and such as are wild. Thus the 3d section applies to persons keeping and using places for the purpose of fighting or baiting any kind of animal whatever; but the interpretation clause limits sect. 2 to ill-treating animals of a domestic nature. Otherwise sect. 2 would have applied to foxes,

and persons pursuing the ordinary sports of the field would have been liable to a penalty ; and, therefore, the operation of sect. 2 has been limited to animals of a domestic nature. This case, therefore, comes within the meaning of that section ; and I am disposed to give a liberal construction to its words, so that it may have the effect of preventing cruelty such as is described in this case.

My brother *Crompton*, who has left the Court, approves of the view which I have taken.

MELLOR J. At one time I doubted whether sect. 2 was not confined to quadrupeds ; but the interpretation clause, sect. 29, shews that it was intended to apply to all animals so far as the word was not restrained by the context. The terms of sect. 2 are large enough to include a cock or any other animal of a domestic nature ; and sect. 29 says, that the word "animal" shall be taken to mean the animals named, or any other domestic animal. Sect. 3 contains the words "cock or other kind of animal ;" and there is an omission in sect. 29 of the word "cock." But having regard to the subject-matter of the statute, and to other expressions in it, I do not feel bound by the rule which would construe the word "animal," in sect. 29, as meaning some animal of the same kind as those before mentioned ; and upon the whole, believing that the intention of the Legislature will be best effectuated by the construction which my brother *Wightman* has given, I agree with him in deciding that this conviction ought to be affirmed.

Conviction affirmed.

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1863.

Friday,
January 16th.

Foreign bills
in sets.
Duty of in-
dorser.
Estoppel.

PINARD, Director &c., against KLOCKMANN and
another.

1. A declaration alleged that *A.*, in parts beyond the seas, made a bill of exchange in four parts, and directed the same to *B.*, in parts beyond the seas, and thereby required him at sixty days sight of that first of exchange, second, third, and fourth of the same tenor and date being unpaid, to pay to *C.* or order 2500 dollars. It then set forth a similar bill of the same date for 2480 dollars, and also a similar one of the same date for 1250 dollars. It then averred that the payees of the bills respectively endorsed them to *D.*, who endorsed them respectively to the defendant, who sold the bills respectively to *E.*, and indorsed to him the firsts of the bills respectively, and *E.* indorsed them respectively to the plaintiff; and the plaintiff, being the holder of those firsts of the bills, transmitted them to be presented to the drawees for sight and acceptance of those firsts, and the same were by accident lost in the course of such transmission, so that they could not be presented for such sight and acceptance, of all which the defendant had notice; and thereupon the plaintiff required the defendant to deliver to him the seconds, thirds, and fourths of the bills: but the defendant would not deliver the same, whereby the plaintiff was prevented from presenting the bills for sight and acceptance within the time during which they could, according to the laws of the country in which they were drawn and made payable, have been presented, and the same thereby became worthless and void, and the plaintiff was deprived of the value and amount thereof. The defendant pleaded that *D.* indorsed to him the firsts of the bills of exchange respectively, and never did indorse to him the seconds, thirds, and fourths of them, and never did deliver to him those seconds, thirds, and fourths; and that *E.* did not, at the time of the sale and indorsement by the defendant to him, or until long after the indorsement by *E.* to the plaintiff, and long after the alleged loss, require the defendant to deliver to him the seconds, thirds and fourths: averment, that the defendant never, at any time, had in his possession or control the seconds, thirds, and fourths, and that he was wholly unable to obtain possession of them. Held, that the declaration disclosed no cause of action.

2. Per *Crompton J.* The plea was bad also.

3. *Seem*, that the defendant was not estopped from setting up the matters alleged in the plea.

THIS action was brought by the plaintiff, as director of the *Comptoir d'Escompte de Paris*, a Company carrying on business in *France*, and, as such director authorized by the law of that country to sue on behalf of the Company.

The declaration alleged that Messrs. *Rinz, Brothers, & Co.*, in parts beyond the seas, (to wit) at *Cardenas*, made their bill of exchange, dated the 27th *October*, A. D. 1860, in four parts, and directed the same to Messrs. *Escorica, Sainz & Co.*, at *Seville*, in parts beyond the seas, and thereby required them, at sixty days' sight of that first of exchange, second, third, and fourth of the same tenor and date being unpaid, to pay to Messrs. *Noreiga, Olmo & Co.*, or order, 2500 dollars: and the said Messrs. *Rinz, Brothers, & Co.*, at *Cardenas* aforesaid, made their other bill of exchange, dated the 27th of *October*, A. D. 1860, in four parts, and directed the same to the said Messrs. *Escorica, Sainz & Co.*, at *Seville* aforesaid, and thereby required them, at sixty days' sight of that first of exchange, second, third, and fourth of the same tenor and date being unpaid, to pay to the said Messrs. *Noreiga, Olmo & Co.*, or order, 2480 dollars: and the said Messrs. *Rinz, Brothers, & Co.*, at *Cardenas* aforesaid, made their other bill of exchange, dated the 27th *October*, A. D. 1860, in four parts, and directed the same to the said Messrs. *Escorica, Sainz & Co.* at *Seville* aforesaid, and thereby required them at sixty days' sight of that first of exchange, second, third, and fourth of the same tenor and date being unpaid, to pay the said Messrs. *Noreiga & Co.* 1250 dollars. It then proceeded as follows. " And the plaintiff says that the said payees of the said bills respectively indorsed the said bills respectively to Messrs. *Escauriza & Serpa*, who indorsed the same respectively to the defendants, and the defendants sold the said bills respectively to Messrs. *C. J. Hambro & Son*, and indorsed to them the said firsts of the said bills respectively, and they indorsed the same respectively to the

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said Company whereof the plaintiff is such director as aforesaid; and the said Company, being the holders of the said firsts of the said bills as aforesaid, transmitted the same respectively to certain persons at *Seville* aforesaid, to be presented by them for the said Company to the said persons at *Seville* aforesaid, upon whom the said bills were so respectively drawn as aforesaid, for sight, and acceptance of the said firsts thereof, and the same were by accident lost in the course of such transmission for such purpose as aforesaid, so that the same were not nor could be presented for such sight and acceptance thereof, of all which the defendants had notice, and thereupon the said Company, whereof the plaintiff is such director as aforesaid, required the defendants to deliver to the said Company the said seconds, thirds and fourths of the said bills respectively, or some or one of such parts of the said bills respectively, but the defendants did not nor would deliver the same or any of them to the said Company, and withheld and detained, and still withhold and detain, from the said Company all such last mentioned parts respectively of the said bills respectively, whereby the said Company were prevented from presenting and were unable to present the said bills or any of them, for sight and acceptance thereof, within the time during which the same could and ought, according to the laws of the country in which the said bills respectively were drawn as aforesaid, and in which the same respectively were so made payable as aforesaid, to have been so presented as aforesaid, and the same have thereby, according to the said laws, become and are wholly worthless and void, and the said Company have wholly lost and have been and are deprived of the value and amount thereof.

Fourth plea : " That the said Messrs. *Escauriza & Serpa* indorsed to the defendants the said firsts of the said bills of exchange respectively, and that the said Messrs. *Escauriza & Serpa* never did indorse to the defendants the seconds, thirds, and fourths of the said bills respectively, or any or either of them, and that they never did deliver to the defendants the said seconds, thirds, and fourths, or any or either of them ; and that the said Messrs. *C. J. Hambro & Son* did not, at the time of the said sale and indorsement by the defendants to the said Messrs. *C. J. Hambro & Son*, or at any time until long after the indorsement by the said Messrs. *C. J. Hambro & Son* to the said Company, and long after the said alleged loss, require the defendants to deliver to them the said seconds, thirds, and fourths respectively, or any or either of them. And the defendants say that they never at any time had, nor have they, in their possession or control the said seconds, thirds, and fourths respectively, or any or either of them, and that they were and are wholly unable to obtain possession of the said parts, or any or either of them."

Demurrer, and joinder in demurrer.

The following were the points for argument delivered on the part of the plaintiff :—

" The fourth plea is bad on the grounds that the defendants, by the sale of the said bills and by their indorsement are estopped from setting up that the said seconds, thirds and fourths were never delivered to them, and that they never had them in their possession or control, and the plaintiff's Company, as the holders of the said bills, are entitled to the benefit of such estoppel, and the defendants are liable to them for such parts of the said

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bills as were not handed over by the defendants to their indorsees, the property in the said bills entitling the holders to the possession of all the parts."

Those of the defendants were :—

" 1. That the first count shews no privity between the plaintiff and the defendants, and consequently can only be supported by proof that the defendants detain the plaintiff's property, which is negatived by the plea.

" 2. That the first count shews no duty on the defendants as between the plaintiff and the defendants to deliver the parts asked for.

" 3. That a sale of a bill drawn in sets does not necessarily amount to a sale of all the sets, and that the circumstances stated in the plea shew that it was not so intended in the present case.

" 4. That the defendants are not estopped from setting up the matters alleged in their fourth plea.

" 5. That such estoppel, if any, is not available in favour of the plaintiff, an entire stranger to the transaction between the defendants and their vendees.

" 6. That the remedy of the plaintiff is against their indorsers, Messrs. *Hambro & Sons*, or against the persons having possession of the bills."

Bovill (*J. A. Russell* with him), in support of the demurrer.—The main question raised by this case is, how far the indorser of a foreign bill of exchange, drawn in parts, is bound to hand over to his indorsee all the parts, if he has got them; and if he has not, then to procure them for him from the previous indorsers. If indeed they are lost, that would be an answer, but the plea contains no averment that they were lost, or that the

defendants had taken steps to obtain them. [*Wightman J.* You are yourself the cause of the difficulty by losing the bill. Ought you not to have applied to all the previous parties who may have the other parts? For all that appears here, the drawer may never have sent out any others.]

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At all events the plea is bad, on the ground that, by the sale of the bills and their indorsements on the firsts of them, the defendants are estopped from saying that the seconds, thirds, and fourths of exchange were not delivered to them, and that they never had them in their possession or control.

There is little authority to be found in our law on this subject. The decided cases are two only,—*Holds-worth v. Hunter* (a) and *Perreira v. Jopp* (b),—both of which shew that, where bills are drawn in sets, the party who first obtains acceptance of any one part of the sets is entitled to the whole of them. In the former case, p. 454, Lord *Tenterden* says, "Suppose two parts of a foreign bill come to the hands of the drawee, he accepts both, and indorses first one part to *A.* and afterwards the other part to *B.* In any question as to property between them, *A.* might be entitled to both." And *Bayley J.* says, "Where a bill is drawn in sets, the party claiming as holder ought to have all the parts, for the payment of any one part to another person may defeat him. Here there were three parts; and it so happens that all of them were sent to the drawee, who was also payee, and he had power to deal with them in those two characters." And *Parke J.*, p. 456, says, "The action was on two foreign bills accepted by the defendant. But it was said in defence that he had before accepted

(a) 10 *B. & C.* 449.

(b) *Id.* 450, note (a).

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another part of each bill, and indorsed it away for value. Assuming that to be so, still I think that, although the defendant had not after so doing, power to bind the drawer, he is estopped from disputing the regularity of his own acceptance. I cannot agree that the doctrine of estoppel is inapplicable to bills; for an acceptor is always estopped from disputing that the bill was regularly drawn." [*Crompton J.* That dictum is often pressed beyond its real meaning, which is, that the indorsement makes one indorser collaterally liable for every other.] If the drawer states on the face of a bill that it is drawn in a specified number of parts, he is estopped from saying there were not that number. In the same way the indorsement on the bill attests what is stated in the body of it. [*Crompton J.* It is only evidence of it. Besides, if you go on the ground of estoppel, your immediate indorser would have the right to the bills.] Several persons may be estopped. [*Crompton J.* The estoppel could only hold up to the time of the indorsement—not after the indorsee had passed the bills to the other person to whom you say he ought to have given them. In *Byles on Bills*, p. 363, note (f), 8th ed., it is said, "It is the duty of a person taking one of the several parts to inquire after the others, *Lang v. Smyth*, 7 Bing. 284, 294; 5 Moo. & P. 78, S. C.; and he is advertised by the part which he does take, that he takes it without the others at his peril."] *Lang v. Smyth* does not apply here. [*Lush*, for the defendant, admitted this. *Mellor J.* What is said there is a mere suggestion.] *Bayl. Bills* ch. 5, sect. 5, p. 170, 6th ed.:—"Upon the transfer of a bill drawn in sets, each part must be delivered to the person in whose favour the transfer is made; otherwise the same inconveniences may follow, which would ensue

upon a neglect to deliver each of them to the payee." [Crompton J. In the preceding page of *Byles on Bills* it is said, "These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill."] At p. 363 the author goes on:—"But the whole set, of how many parts soever it be composed, constitutes but one bill, and the regular payment and cancellation of any one of the parts extinguishes all. . . . But as between *bonâ fide* holders for value of different parts of the same bill, he who first obtains a title to his part is entitled to the other parts, and may, it has been said, maintain trover for them, even against a subsequent *bonâ fide* holder." In *Chitty on Bills of Exchange*, 10th ed., by Russell and MacLachlan, 104 (8), indeed, we find:—"Foreign bills, in general, consist of several parts, in order that if the bearer lose one, he may receive his money on the other. If a person has engaged to deliver a foreign bill it seems that he is bound, on request, to deliver as many parts of it as may be applied for; but if the drawer give only one bill, he will, if it should be lost, be obliged to give another of the same date to the loser;" for which are cited *Pothier* and *Pardessus*. But this is at variance with *Story on Bills*, sect. 66, where it is said:—"It seems, that, if any person undertakes to draw or deliver a foreign bill to another person, he is bound to deliver to him the usual set or number of parts;" for this he cites *Chitty*; "and some of the foreign jurists are said to hold, that the promisee may, in such a case, demand as many parts, as he chooses. Of this, however there may be a reason-

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able doubt entertained." In note (2) he adds, "Mr. *Chitty* states this to be the opinion of *Pardessus*. I do not find any such opinion stated in his work on commercial law, though he there speaks on the subject of sets of exchange. . . . Upon the subject of sets of exchange, *Heineccius* says 'Porro cambia vel sola, vel plura simul dari posse, jam supra animadvertimus. Posterius fit commodum præsentantis, ut, uno alterove exemplari perditio, reliquis adhuc uti possit. Tunc vero observandum est camptoribus; (1.) eas litteras omnes pro unicus haberi; (2.) easdem per omnia sibi similes esse debere, præterquam quod secundis et sequentibus inseri solet clausula, &c.; (3.) recte et adcurate illas esse numerandas, ne binæ, secundæ, vel tertiæ, exstent. Qui plures ejus generis tesseræ collybisticas (a) habet, primam statim potest præsentare ad acceptandum, dum reliquæ per alia loca gerentur. Acceptantis enim æque, ac trassantis (b), non interest, si vel maxime reliquæ per cessionem in alienas manus perveniant, quia non nisi ex una soluit, ex reliquis vero tum demum solutio exigi potest, si illa ex prioribus nondum sit præstita.'"

In *Pothier, Contrat de Change*, 1^{ère} part., ch. 3, § 1, N. 37, "Il est encore aujourd'hui d'un usage très-fréquent de tirer par première et seconde les lettres de change qui ont un certain nombre d'usances à courir, surtout celles que l'on envoie à l'étranger. On envoie la première à l'acceptation, et l'on passe l'ordre sur la seconde, en mettant au bas chez qui on trouvera la première acceptée. Quoique le tireur n'ait d'abord donné qu'un exemplaire,

(a) "*Collybisticas*," an adjective evidently formed from *collybistes*, or *collybista*, *κολλυβιστής*, a banker or money-changer. See *Facciolati's Lexicon*, by *Bailey*.

(b) *Trassare*, perquirere. *Du Cange, Glossarium mediæ et infimæ Latinitatis*.

il est tenu, lorsqu'il en est requis, d'en donner un autre, lorsque le premier a été égaré." And again, ch. 5, sect. 1, N. 130: "Si le porteur d'une lettre de change l'a égarée il doit s'en faire donner un second exemplaire par le tireur. Lorsqu'il ne tient pas immédiatement du tireur la lettre de change, et que la lettre contient plusieurs endossements, il doit, pour avoir ce second exemplaire, s'adresser au dernier endosseur qui lui en a passé l'ordre; et le dernier endosseur doit, sur la réquisition qui lui en fait par écrit le porteur de la lettre, lui prêter ses bons offices auprès du précédent endosseur, et ainsi d'endosseur en endosseur jusqu'au tireur, pour avoir un second exemplaire. C'est la disposition du règlement du 30 Août, 1714." [*Crompton J.* That is quite contrary to your argument that he is bound to give it. According to *Pothier*, the last indorser is only bound to lend the bearer his good offices with the previous indorser.] So, *Pardessus, Cours de Droit Commercial*, part 3, tit. 2, ch. 7, sect. 3, § 409: "Cependant il peut arriver qu'à l'époque de la confection de la lettre de change, le preneur n'ait pas eu la précaution de se faire donner plusieurs exemplaires. Dans ce cas, le porteur est autorisé à s'adresser au tireur, s'il tient la lettre de lui immédiatement, sans l'intermédiaire d'aucun endosseur, et à lui demander un nouvel exemplaire de la lettre. Le tireur est tenu d'obtempérer à cette demande, en prenant les précautions dont nous avons parlé, Nos. 323 et 342. Dans le doute sur le point de savoir s'il a, ou non, délivré déjà le *duplicata*, *triplicata*, ou autre exemplaire demandé, il est prudent qu'il marque celui qu'il délivre, du numéro sur l'exactitude duquel il n'a pas de doute. Lorsque le porteur ne tient pas la lettre immédiatement du tireur, et qu'elle a été négociée, il doit s'adresser

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au dernier endosseur qui lui a passé l'ordre ; celui-ci est tenu sur cette réquisition, de lui prêter son nom et ses soins pour agir envers son propre endosseur, et ainsi en remontant jusqu'au tireur. Ces personnes ne peuvent refuser leur nom, sous prétexte que le réclamant n'a pas fait, contre elles, les diligences dont nous parlerons au chapitre suivant, et qu'il est déchu ; car le recouvrement d'un exemplaire peut avoir pour résultat de mettre le demandeur à même d'agir contre quelques obligés au profit desquels la déchéance n'est pas encore encourue."

Honyman (absente *Lush*), contrà.—The plaintiff must rest his case, as between himself and the defendants, on the ground either of contract or of the detention of the bills by them : now the defendants' contract was not with the plaintiff, but with *Hambro & Son*. [*Wightman J.* Have you any authority that can throw light on this matter ?] No. All the authorities bearing upon it seem to have been already referred to.

The plaintiff's counsel did not reply.

WIGHTMAN J. It seems to me that the effect of the case which Mr. *Bovill* has set up and supported by the dicta of several learned foreign jurists is, that, instead of suing the defendants, the plaintiff was bound to apply for the other parts of this bill either to the drawer or the immediate indorser. Here he has done neither ; if he had, perhaps he would have got all he required. What might have been the effect of the refusal of either of those parties to let him have them it is unnecessary to determine,—it is enough to say that the authorities are entirely against the maintenance of this action.

CROMPTON J. I also am of opinion that Mr. *Bovill* has not been successful in his argument. He has not produced any authority in support of it. It appears to me impossible to say that, as against these defendants, there is any obligation on them to give the remaining parts of these bills to the plaintiff when he lost the parts which he had. The obligation as put is, that the indorsers of such bills are bound to hand them over from one to the other. I do not see my way even to that, but we need not now inquire into it, for here application for the bills is made to the party who passed them on to the person from whom the plaintiff holds them. The declaration is bad for not shewing any such obligation or duty on that person to give up or procure them, and the plea is bad for not shewing that he had the bills at the time when request was made to the defendants for them. I do not see any more obligation on the defendants in this matter than would be on any stranger who has got the property of another; unless indeed it can be made out that they are bound to lend their good offices, or do what they could to get the bills.

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MELLOR J. concurred.

Judgment for the defendants.

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*Saturday,
January 24th.*

*Turnpike Act,
3 G. 4. c. 126.*

s. 121.

*"Wheeled
carriage."*

*"Timber,
stone, or other
thing."*

**The RADNORSHIRE COUNTY ROADS BOARD,
appellants, EVANS, respondent.**

The Turnpike Act, 3 G. 4. c. 126. s. 121., enacts, that if any person shall haul or draw upon any turnpike road "any timber, stone, or other thing, otherwise than upon wheeled carriages, or shall suffer any timber, stone, or other thing, which shall be carried principally or in part upon wheeled carriages, to drag or trail upon such road to the prejudice thereof," he shall be subject to a penalty not exceeding 40s. over and above the damages occasioned thereby. On an information for hauling and drawing upon the turnpike road a quantity of bolting straw otherwise than upon a wheeled carriage: held,

1. That a wheel-car, being a rough skeleton of woodwork, about fifteen feet in length and four in breadth, placed upon two wheels, which ran rather behind the centre, and the forepart of it (which was shod with iron) when going down hill slid along the ground and retarded its descent, was not a "wheeled carriage" within the meaning of the section. But

2. Per *Crompton* and *Mellor JJ.*, *Cockburn C.J.* dubitante, that the "other thing" so hauled or drawn must be ejusdem generis as timber or stone.

**CASE stated by justices under stat. 20 & 21 Vict.
c. 43.**

At a Petty Sessions holden at *Knighton*, in the county of *Radnor*, the respondent appeared to answer an information laid at the instance of the *Radnorshire County Roads Board*, under sect. 121 of The General Turnpike Act, 3 G. 4. c. 126., which enacts, among other things, as follows: If any person or persons "shall haul or draw, or cause to be hauled or drawn upon any part of such turnpike road, any timber, stone, or other thing, otherwise than upon wheeled carriages, or shall suffer any timber, stone, or other thing, which shall be carried principally or in part upon wheeled carriages, to drag or trail upon such road to the prejudice thereof; or shall

use any tipstick, joggle or other instrument for the purpose of retarding the descent of any cart or other carriage down any hill, in such manner as to destroy, injure or disturb the surface of any turnpike road," "every person offending in any of the cases aforesaid, shall for each and every such offence forfeit and pay any sum not exceeding 40s., over and above the damages occasioned thereby."

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The information charged that the respondent "did cause to be hauled and drawn upon the turnpike road in the parish of *Knighton*, in the county of *Radnor*, a quantity of bolting straw otherwise than upon a wheeled carriage."

At the hearing of the case, the complainants called a witness who deposed that he saw a wheel-car belonging to the respondent, drawn by horses and loaded with straw, on the turnpike road leading towards *Knighton*; and described it as follows: "There were two wheels of the car; the wheels are at the back part of the carriage, the forepart slides along the ground, which is injurious to the turnpike road; it is the worst thing that can be used on a road that has been fresh stoned, as it drives all before it. On the above occasion the forepart of the carriage slid along the turnpike road." The carriage called a wheel-car is used by farmers in that neighbourhood for the purpose of hauling farm-produce, coppice wood and fern, from those portions of hill farms which would be inaccessible to carts and waggons. It is a rough skeleton of woodwork, about fifteen feet in length and four feet in breadth, placed upon two wheels which run rather behind the centre, and the forepart of it (which is shod with iron) when going down hill slides along the ground and retards its descent.

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The justices were of opinion that the straw hauled by the respondent, being upon a carriage with wheels, was upon a "wheeled carriage" within the meaning of the Act; and that the words, "timber, stone or other thing" were intended to apply to something of the like nature or quality as timber or stone, and therefore dismissed the information.

The opinion of this Court was requested as to whether or not the justices were correct in point of law in their determination.

Gilmore Evans, for the appellants.—First. The term "wheeled carriages" in sect. 121 of stat. 3 G. 4. c. 126. means carriages entirely drawn upon wheels. That is the meaning of the word "carriage" in other sections of the Act: for instance, sect. 5 regulates the construction of the tire or tires of the wheels "of any waggon, cart or other such carriage, which shall be used or drawn on any turnpike road;" and sect. 6 enacts that "no waggon or other such carriage shall be allowed to travel or be used on any road, with the fellies of the wheels thereof of a less breadth than three inches." The wheel-car in question, which is partly drawn on wheels and partly drags on the ground, is within the mischief contemplated in sect. 121; and that mischief can only be reached by an information under the first clause. If an information had been preferred against the respondent, under the clause against using a "tipstick, joggle or other instrument for the purpose of retarding the descent of any cart or other carriage down any hill," it would have been objected that the forepart of the carriage which slid along the road was not an instrument analogous to a tipstick.

Secondly. The words "other thing" in sect. 121 mean "any other thing." The rule of construction as to words ejusdem generis does not apply.

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No counsel appeared for the respondent.

COCKBURN C. J. I do not doubt that this wheel-car, reference being had to the peculiar construction of it, was not a carriage upon wheels ; for although, generally speaking, it might be so, yet the question here being what it was at the time of the alleged offence when it was being drawn on the turnpike road, it became then a species of sledge carriage, the apparatus in the forepart of it sliding along the road ; and therefore it was not a "wheeled carriage" within the meaning of stat. 3 G. 4. c. 126. s. 121.

The other is a more difficult question. The clause pointing out the description of load which is not to be carried otherwise than upon wheeled carriages, or which, when carried principally or in part upon wheeled carriages, is not to be allowed to drag or trail upon the road to the prejudice thereof, specifies "any timber, stone, or other thing ;" and the question is whether the words "other thing" are limited by the words going before. Considering this as a remedial enactment for the protection of roads against a prejudicial use of them, I am inclined to give a large construction to the clause, and not subject the general words to be governed by those which go before, according to a rule the application of which is very often inconvenient. But my learned brothers think that, the "other thing" must be ejusdem generis as the "timber" and "stone" before mentioned ;

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and, having expressed my doubts, I do not wish to oppose their view.

The result is that, while I concur in overruling the decision of the justices on the first point, I do not oppose the affirming of their decision on the second.

CROMPTON J. I am inclined to think that this wheel-car is rather a sledge carriage than a carriage on wheels, as the forepart of it slides along the ground, and its having two wheels behind does not make it altogether a wheeled carriage.

On the other point, I think the ordinary rule of construction when applied to the words, "any timber, stone, or other thing," ought to lead us to hold that the "other thing" must be something weighty, and which, when loaded on the carriage would cause the same injury to the road as timber or stone ; especially when we see the same words used in the next sentence of the clause. Probably it was not intended to prevent the use of a sledge for the conveyance of such light burdens as hay and straw ; and it is difficult to see how hay or straw could injure a road by dragging or trailing upon it. At any rate, this is a clause subjecting persons to a penalty, and is to be construed strictly ; and I think it would be dangerous not to adopt the general rule.

Therefore I am of opinion that the information was rightly dismissed on the second ground, though in all probability the justices were wrong on the first point.

MELLOR J. I am also of opinion that the order must be affirmed. Mr. *Evans* has argued the case ingeniously ; but, agreeing with my Lord Chief Justice on the point

as to the construction of this carriage not bringing it within the term "wheeled carriage," I think that, in construing the words "any timber, stone, or other thing," we must consider the latter term to be limited to things of the same nature as timber or stone, and calculated to do the same amount of mischief to the road. The section appears to be artistically drawn; for in the first clause against riding or driving on footpaths, after enumerating certain animals, the words are "cattle or carriage of any description"; and in sect. 122, giving the surveyors power to impound cattle found straying about a road, the words "horse, ass, sheep, swine" are followed by "other beast or cattle of any kind;" so that the language seems to be purposely varied.

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Order affirmed.

SANDREY *against* MICHELL and another.

Tuesday,
January 27th.

Declaration by a creditor against the sureties on an administration bond in the form given by the rules of the Probate Court, under stat. 20 & 21 Vict. c. 77. s. 81., and assigned to him in pursuance of sect. 83, alleging that assets came to the hands of the administrator, and that he wasted and appropriated and disposed of the same to his own use, and did not pay the debt of the plaintiff, who was thereby put to damage, and that all things existed and happened necessary to entitle the plaintiff to have the bond assigned to him, and to make the assignment to him valid, and to entitle him to recover on the bond the debt and damages sustained. Plea, that the only breach of the condition of the bond was the non-payment of the debt of the plaintiff. Replication, that the administrator wasted and misappropriated and disposed to his own use, personal estate and effects of the deceased sufficient to pay, and where-with he could and ought to have paid, the debt of the plaintiff: Held that the defendant was entitled to judgment, as the bond could only be enforced for the benefit of persons interested in the estate of the intestate, and not to recover the debt of the plaintiff, and this even although the plaintiff alleged a devastavit as the reason why the administrator had not paid the debt.

Probate Act,
1857, 20 & 21
Vict. c. 77.
ss. 81, 83.
Administration
bond.
Assignment
to creditor.
Action.

THE declaration stated that *Edward Bawden* died in the year 1860 intestate, and thereupon, after the

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passing and coming into operation of stat. 20 & 21 *Vict.* c. 77., administration of his estate and effects was granted to *John Bawden* by virtue and in pursuance of that Act: and thereupon *John Bawden*, with the defendants as his sureties in that behalf, in pursuance of the provisions of that Act, gave bond to the Right Hon. Sir *Cresswell Cresswell*, Knight, then and at all times thereafter being the Judge of the Probate Court, which bond was sealed by *John Bawden* and the defendants respectively, and was in the form by law and the practice of the said Court in that behalf directed and required, that is to say, &c. The condition of the bond, by which *John Bawden* and the defendants were jointly and severally bound in the sum of 900*l.*, was, "that if the above bounden *John Bawden*, the natural and lawful brother and one of the next of kin of *Edward Bawden*, late of &c., deceased, who died on the 12th *July* 1860, a bachelor, without parent and intestate, do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to his hands, possession or knowledge, or into the hands and possession of any other person for him, and the same so made do exhibit or cause to be exhibited into the District Registry of *Bodmin*, attached to Her Majesty's Court of Probate, whenever required by law so to do; and the same personal estate and effects, and all other the personal estate and effects of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said *John Bawden*, or into the hands or possession of any other person or person for him, do well and truly administer according to law,

(that is to say) do pay the debts which he did owe at his decease; and further, do make or cause to be made a true and just account of his said administration whenever required by law so to do, and all the rest and residue of the said personal estate and effects do deliver and pay unto such person or persons as shall be entitled thereto under an Act of Parliament, intituled, 'An Act for the better settling of Intestates' Estates,' [22 & 23 Car. 2. c. 10.]; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said *John Bawden*, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) into the said Court; then this obligation to be void and of none effect, or else to remain in full force and virtue." The declaration then proceeded to allege that *Edward Bawden*, at the time of his death, was indebted to the plaintiff in the sum of 36*l.* 18*s.*, which still remained unpaid, of which debt, and the non-payment thereof, *John Bawden* had notice; and after the said decease personal estate and effects of *Edward Bawden* to a large amount, to wit, 500*l.*, and sufficient wholly to pay and satisfy the said debt, and wherewith *John Bawden*, as administrator, could have satisfied the same, came to his hands and possession as administrator: yet he did not well and truly administer according to law the said personal estate and effects, and wrongfully wasted and appropriated and disposed of the same to his own use, and did not pay the said debt to the plaintiff, and thereby the condition of the bond was broken, and the bond was

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forfeited. And by reason of the premises, and in and about suing *John Bowden* as administrator in the Court of Queen's Bench for the said debt, and obtaining judgment and execution of the same, and endeavouring to enforce by law and to obtain payment of the same, the plaintiff was put to great cost and damage. And by reason also of the premises in and about causing *John Bowden* and the defendants to be cited into the Probate Court for the purpose of the plaintiff's applying for and obtaining the assignment thereafter mentioned, and in and about procuring such assignment, the plaintiff was, before this suit, obliged to pay, and to incur the liability to pay, other costs and expences. The declaration concluded by alleging that after the said breach of condition, and after the death of *John Bowden*, to wit, on the 19th *June*, 1862, the bond and all benefit and advantage arising therefrom was, in pursuance of an order made by the Court of Probate, after the said breach of condition and on being satisfied of the same, and in pursuance of the provisions of the said statute, assigned by *Edward Francis Jenner*, one of the registrars of the said Court, to the plaintiff (the plaintiff being named in that behalf in the said order), the said assignment being duly signed, sealed and executed by the said registrar; and all things existed and happened necessary to entitle the plaintiff to have the bond assigned to him, and to make the assignment to him valid, and to entitle him to recover on the bond the said debt and the damages sustained by him as aforesaid: yet the defendants had not paid the same or any part thereof, nor the sum mentioned in the bond, or any sum.

Plea. That the only breach of the condition of the

bond that had happened or been committed was the non-payment by *John Bawden* of the said debt to the plaintiff.

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Demurrer, and joinder therein.

Replication. That *John Bawden* did wrongfully waste and misappropriate, and dispose to his own use, personal estate and effects of *Edward Bawden* sufficient to pay, and wherewith he could and ought to have paid, the debt to the plaintiff, and which he did not pay.

Demurrer, and joinder therein.

Aspland, for the plaintiff.—The Act to amend the law relating to probates and letters of administration, 20 & 21 *Vict. c. 77*, sect. 80, repeals so much of the former Acts, 21 *H. 8. c. 5.* and 22 & 23 *Car. 2. c. 10.*, commonly called the Statute of Distributions, as require a bond to be given by the person to whom administration is granted; and sect. 81 enacts, that “every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate to enure for the benefit of the Judge for the time being, and if the Court of Probate, or (in the case of a grant from the district registry) the district registrar, shall require, with one or more surety or sureties, conditioned for duly collecting, getting in and administering the personal estate of the deceased, which bond shall be in such form as the Judge shall, from time to time, by any general or special order, direct.” Sect. 82 regulates the penalty of the bond. And by section 83 the Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars

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of the Court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the same bond, in his name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond. The bond in the present case follows the form required by the rules made by the Court of Probate in pursuance of stat. 20 & 21 *Vict.* c. 77., which form provides expressly for paying the debts of the intestate. And being for the payment of debts, it is also within the words in sect. 81, "administering the personal estate of the deceased."

The old authorities decided on stat. 22 & 23 *Car.* 2. c. 10., and the form of the bond given in pursuance of it, have no bearing on a bond in the present form. Stat. 21 *H.* 8. c. 5. s. 3. directs the Ordinary to grant administration, "taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels and debts which he or they shall be so authorized to minister." And stat. 22 & 23 *Car.* 2. c. 10. s. 2. prescribes the conditions of the bond, one of which is that the administrator "do well and truly administer according to law," without specifying the payment of debts. In *The Archbishop of Canterbury v. Robertson* (a), Lord Lyndhurst, remarking on *Brown v. The Archbishop of Canterbury* (b), says, p. 710: "In that case the plaintiff was a creditor, and in his replication had assigned, as a breach of the condition of the

(a) 1 *Cr.* & *M.* 690.(b) *Lutw.* 882.

bond, that the intestate was indebted to him by bond in a sum of 200*l.*; that assets to that amount had come to the hands of the administrator, and that the bond debt was not paid by the administrator. The Court of King's Bench, upon demurrer, gave judgment for the plaintiff: upon a writ of error that judgment was afterwards reversed, upon the ground, as the Court stated, that the breach assigned was not within the meaning of the condition. That decision, as I understand it, amounted to this—that the object of the Act was not to provide a remedy for creditors, for they already had, by law, a remedy for the recovery of their debts; and therefore that the breach so assigned was not within the intent and meaning of the Act of Parliament—within the meaning of the Legislature at the time they passed that law.” This bond, being expressly conditioned for the payment of debts, the breach assigned is good, and the plea is bad.

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Bullar, for the defendants.—The first point arises on the replication, which is in the nature of a new assignment. This bond does not comply with the terms of stat. 20 & 21 *Vict. c. 77. s. 83.*, and therefore the assignee cannot sue upon it. It is not necessary to contend that the bond is void. In *Edmonds v. Challis* (a) it was held that a replevin bond, the condition of which was in the form generally used, but varied from the terms of stat. 11 *G. 2. c. 19. s. 23.*, though it might be a good voluntary bond between the parties, could not be assigned. [He also cited *Stansfeld v. Hellawell* (b).] Sect. 81 says that the bond shall be conditioned “for duly collecting, getting in and administering the personal estate of

(a) 7 *C. B.* 413.(b) 7 *Erch.* 373.

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the deceased." There are six conditions in this bond :
 1. The making an inventory of the effects of the deceased. 2. The exhibiting it in the District Registry of the Probate Court at *Bodmin*. 3. The well and truly administering the effects of the deceased. 4. The making a true account of his administration. 5. The administering the residue of the effects according to stat. 22 & 23 *Car. 2. c. 10*. 6. The delivering the letters of administration into the Court if a will of the deceased should be discovered. The first and second conditions are not within stat. 20 & 21 *Vict. c. 77.*; the third is within it; but the fourth and fifth are not, and the fifth may involve difficult questions, such as that of domicile. [*Cockburn C. J.* If the bond had been assigned to the administrator it would have imposed no new obligation on him: he must administer according to the Statute of Distributions.] The condition of the bond, given in pursuance of stat. 22 & 23 *Car. 2. c. 10. s. 2.*, did not bind the administrator to distribute the surplus of the intestate's estate, after payment of debts, until there had been a decree of the Ecclesiastical Court; *The Archbishop of Canterbury v. Tappen* (a). Although stat. 20 & 21 *Vict. c. 77. s. 80.* repeals the old statutes, it does not repeal the power of the Probate Court to make a decree with reference to the administration of the residue. [He referred to sect. 23.] [*Cockburn C. J.* The administrator has duties to perform independently of a suit and the decree of the Court. *Crompton J.* Is not the *form* of the bond in the nature of procedure? The Judge of the Probate Court is to make general regulations and it is his duty to direct the form of the bond. By stat.

(a) 8 B. & C. 151.

20 & 21 *Vict. c. 77. s. 119.* the rules and orders so made are to be laid before the two Houses of Parliament. After that, must they not be considered valid?] Sect. 119 probably refers to the rules and orders to be made in pursuance of sect. 60 for regulating the procedure and practice of the County Courts in relation to their jurisdiction and proceedings under this Act. But the laying of rules and orders before the Houses of Parliament cannot give validity to a bond the condition of which, though framed according to those rules, does not comply with the statute.

Secondly. The breach alleged, viz., the non-payment of a debt due from the administrator quâ administrator to a creditor, is not a breach of the condition to administer truly according to law. In *Brown v. The Archbishop of Canterbury* (a), where the Court of Exchequer Chamber reversed the judgment of this Court, the condition of the bond was in substance the same as in the present form, and the only difference between the two cases is that, in that case, there was a debt by obligation. The reasons of the judgment in the Exchequer Chamber do not appear; but one may be that if non-payment of a debt was a breach, the administrator might be concluded from paying funeral expences which have precedence even before a bond debt. This point is governed by the question whether this is an assignable bond; and the judgment of Lord Lyndhurst in *The Archbishop of Canterbury v. Robertson* (b) shews that, according to the old authorities,—*The Archbishop of Canterbury v. Willis* (c), *Greenside v. Benson* (d), recognised in *The Archbishop of Canterbury*

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(a) *Lutw.* 882.

(b) 1 Cr. & M. 690. 710.

(c) 1 *Salk.* 315.(d) 3 *Atk.* 248.

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v. *Tappen* (a),—a creditor could not sue for nonpayment of his debt on the bond, even though he alleged a devastavit which prevented the debt being paid. [*Crompton J.* referred to 1 *Williams's Executors*, 470, and note (b), 5th ed.] Sect. 83 of stat. 20 & 21 *Vict. c. 77.* for the first time introduced an action on the administration bond by a creditor, but it did not alter the law except in that respect. [He was then stopped.]

Aspland, in reply.—The intention of the Legislature, in passing stat. 20 & 21 *Vict. c. 77.*, was to sweep away the old law so far as restrained a creditor from suing on the administration bond to enforce payment of his debt. [*Wightman J.* An individual creditor has his remedy to recover his debt by action against the administrator.] The payment of debts is a most important part of administration, because the next of kin has only an interest in the residue. The bond under stat. 21 *H. 8. c. 5.* was as general as this is; and the things mentioned in the condition of this bond are comprised within stat. 20 & 21 *Vict. c. 77. s. 81.* The making an inventory is matter of practice only. The bringing in of the will is required by sect. 75, and the duties of an administrator do not end as soon as a will is discovered. Even if part of the condition of this bond goes beyond the statute, the condition may be split, and that part would be surplusage, and the bond would be assignable notwithstanding. Further, the bond may be considered as sued upon by the assignee as trustee for all persons interested. Stat. 20 & 21 *Vict. c. 77.* has express reference to creditors; the repealed Acts had reference only to distribution amongst the legatees, the next of kin, and

(a) 8 *B. & C.* 151.

persons entitled to the residue ; per Lord *Hardwicke*, in *Wallis v. Pipon* (a).

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COCKBURN C. J. Under the old law the administration of the estate and effects of an intestate was within the jurisdiction of the ecclesiastical authorities, and the Ordinary was empowered to take a bond from the administrator to ensure due administration. When the jurisdiction of the Ecclesiastical Courts in matters testamentary was abolished, and the jurisdiction of the Judge of the Court of Probate substituted, it became necessary to give him the power to exact a bond for due administration, which before was vested in the Ordinary ; and, inasmuch as it would have been inconvenient, where it was necessary to assign the bond, that a suit to enforce it should be instituted in the name of the Judge of the Probate Court, a new enactment was introduced enabling a creditor to whom the bond had been assigned to sue in his own name, not for his own benefit, but as trustee for all persons interested in the estate. That shews an intention to leave the effect of the assignment of the bond as it stood under the old law. Now it is clear, on the authorities, that a creditor taking an assignment of the bond given to the Ordinary, could sue for the benefit of all persons interested, but not for his own debt, even though he alleged a *devastavit* as the reason why the administrator was not able to pay. On the present pleadings the plaintiff, the creditor, alleges the non-payment of his debt ; it is true he alleges a *devastavit*, but only as the reason why his debt is not paid. That is the very case in which the authorities tell us he cannot

(a) *Ambl.* 183.

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sue. In any way in which we read the plea and the replication, the present case is within the authority of the cases cited in *The Archbishop of Canterbury v. Robertson* (a); and the law laid down there is untouched by stat. 20 & 21 *Vict. c. 77.*, except that, instead of suing in the name of the Ordinary, the creditor now sues in his own name as assignee of the bond, *mutatis mutandis*. Our judgment therefore must be for the defendants.

I will add, that the law is based on the soundest principle: the bond is taken, not for the benefit of any particular person, but for the due distribution of the estate generally; and it cannot be put in force, for the benefit of any particular creditor who has peculiar remedies, which ought not to be mixed up with that which is intended for the benefit of those who are generally interested in the estate.

WIGHTMAN J. I am of the same opinion. The recent statute, 20 & 21 *Vict. c. 77.*, has made no alteration in the law beyond this, that it enables a creditor, on having the bond assigned to him, to sue in his own name instead of, as before, in the name of the Ordinary. The point has been already decided; and I refer to the cases cited in *The Archbishop of Canterbury v. Robertson* (a), as authorities for the opinion which I entertain, that the plaintiff cannot maintain an action on the ground which he suggests in his declaration and replication. Lord *Lynnhurst* C. B., delivering the judgment of the Court in that case, points out that the law clearly was that a creditor shall not sue for his debt upon the bond even if

(a) 1 *Cr. & M.* 690. 710.

he suggests a devastavit. That is exactly applicable to the present case : the only change being that the action in form is in the name of the assignee, instead of the Ordinary.

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CROMPTON J. The Lord Chief Justice and my brother *Wightman* have pointed out the true distinction, that the bond may be enforced for a general wasting of the estate, but not to compel payment of the debt of a creditor, even though he allege a devastavit which has led to the non-payment; and the creditor, though now suing in his own name, is essentially in the same position as the Archbishop was before the passing of stat. 20 & 21 *Vict. c. 77*. The cases which were cited by the Lord Chief Justice and my brother *Wightman*, decided under the old law, shew that the Ordinary could only sue for the general benefit of the persons interested, and not for the non-payment of a particular debt. The only difficulty on this part of the case arises from the somewhat loose way in which the pleadings are framed; because the declaration, although setting out the bond, alleges a breach of the condition by non-payment of the plaintiff's debt, and then states the damages arising from the detention of it; and after stating the assignment of the bond there is this general allegation, that "all things existed and happened necessary to entitle the plaintiff to have the bond assigned to him, and to make the assignment to him valid, and to entitle him to recover on the bond the said debt and the damages sustained by him." Looking at all these allegations I think the present case is brought within those referred to by my brother *Wightman*, for they shew that the plaintiff is a creditor suing

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for his own debt and for damages for the detention of it, and not for the benefit of the estate generally.

. As to the subsequent pleadings. The plea merely states that the only breach of the condition was the non-payment of the debt : to this the replication is, that the administrator "did wrongfully waste and misappropriate, and dispose to his own use, personal estate and effects of *Edward Bawden* sufficient to pay, and wherewith he could and ought to have paid, the debt to the plaintiff ;" which either fortifies the declaration by saying that the reason why the defendants did not pay the debt was a devastavit of the effects of the intestate, or is a departure from the declaration, asserting a new breach, and so is bad on general demurrer according to recent authorities. But I understand it as fortifying the declaration by shewing how the non-payment of the debt for which the creditor is suing arose, viz., by a devastavit.

MELLOR J. concurred.

Aspland asked to be allowed to amend the declaration, so that the plaintiff should sue as trustee under sect. 83 of stat. 20 & 21 *Vict. c. 77*.

Per CURIAM. Upon payment of costs within one month the plaintiff to be at liberty to amend ; otherwise judgment for the defendants.

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The QUEEN *against* HEAD and The Metropolitan
Board of Works.

Saturday,
January 24th.

*Metropolis
Local Manage-
ment Act,
18 & 19 Vict.
c. 120. ss. 161.
163, 164.
Sewers rate.
Mains and
pipes of Gas
Company.*

The Metropolis Local Management Act, 18 & 19 *Vict. c. 120. s. 161.* enacts that the sewers rate shall be levied on the persons and in respect of the property rateable to the relief of the poor, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor. Sect. 163 provides that the sewers rate shall, as regards land used as arable, meadow, or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground, be assessed and levied in the proportion of one-fourth part only of the net annual value. And sect. 164 provides "that where any property was at the time of the issuing of the first commission under the said Act of the 11 & 12 *Vict. c. 112.* (The Metropolitan Commissions of Sewers Act), entitled to exemption from or to any reduction or allowance in respect of the sewers rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewers rate under this Act." On appeal by a gas light and coke Company against a sewers rate, in which they were assessed in respect of their mains and pipes upon their net annual value ascertained by the poor rate for the time being, the Sessions, being of opinion that the appellants derived only half of the benefit in respect of their mains and pipes as compared with other property in the parish, reduced the rate to one half the amount. Held that, inasmuch as the mains and pipes did not fall within the description of property mentioned in sect. 163, nor within any exemption or reduction mentioned in sect. 164, the appellants were not entitled to any deduction on the ground of the mains and pipes deriving less benefit than other property from the sewers.

ON appeal at the *Middlesex Quarter Sessions*, by *The Imperial Gas Light and Coke Company*, against a sewers rate, made by *William Buxton Head*, a person appointed by the Metropolitan Board of Works to levy moneys required by the Board for the parish of *Fulham*, pursuant to stat. 18 & 19 *Vict. c. 120. s. 168.*, the Quarter Sessions reduced the rate to one half the amount, subject to the opinion of this Court on the following case.

The appellants are a Company, incorporated by Act of Parliament, for supplying the public with gas. The

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rate in question was duly made, allowed and published.

The heading was as follows :

" A rate or assessment, made this 25th *May*, 1861, under and by virtue of" stat. 18 & 19 *Vict. c.* 120., "intituled 'An Act for the better Local Management of the Metropolis', after the rate of 4*d.* in the £ upon the net annual value of the property by law rateable to the relief of the poor within that part of the parish of *Fulham*, in the county of *Middlesex*, which was at or immediately before the determination and expiration of The Metropolitan Sewers Act, 1848, included in the *Counter Creek* separate sewerage district (except so far as regards land in the said part of the said parish used as arable, meadow or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit or nursery ground, which said last mentioned land is, in and by this assessment, assessed in the proportion of one fourth part only of the net annual value of such land), for levying, in the said part of the said parish of *Fulham*, the sum of 340*l.* 14*s.* 6*d.*, required by the Metropolitan Board of Works for the purposes of the first mentioned Act, for the year ending the 31st *December*, 1857, by me, *William Buxton Head*, of &c., being the person duly appointed by the said Board, under the provisions of the said first mentioned Act, to levy the money required by them as aforesaid ; which amount the Board of Works for the *Fulham* District, constituted by the said first mentioned Act, were required, by a precept of the said Metropolitan Board, made on the 6th *August*, 1858, and directed to be duly served upon the said District Board of Works, pursuant to the provisions of the said first mentioned Act, to pay, within the time and in the manner therein limited, and which amount the said

District Board of Works for the *Fulham* District had, before the appointment of me as aforesaid by the said Metropolitan Board, made default in paying as required by the said precept."

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The appellants were rated and assessed in respect of their "Gas works, consisting of retort houses, and retorts therein, purifier and purifying houses, lime sheds, gas holders, valve house, the fixed machinery, various buildings and appurtenances, wharf and lay-byes, their mains and apparatus for supplying persons with gas, clerks' houses, lodge, &c., &c.," the rateable value being stated at 3910*l.* and 90*l.* The appellants are occupiers of land in the parish of *Fulham* by (amongst other things) their mains and pipes for supplying persons with gas, and the sum of 90*l.* appearing in the assessment, against which this appeal was made, was the rateable value of such mains and pipes. The above assessment on the gas Company was made on the net annual value of the property, and was identical with the assessment on the same property in the rate for the relief of the poor in the parish. The amount of 90*l.* was, for the purpose of this case, to be taken as the fair annual value of the said property, assuming that the Company were to be assessed in respect of their mains and pipes on the same principle as the occupiers of houses and other rateable property in the parish. The expences, in respect of which the rate in question was made, were incurred by the Board for the formation and maintenance of the main sewers necessary for the drainage of the district in which the parish is contained.

At the hearing of the appeal the appellants contended that, the mains and pipes being used only for the purpose of conveying gas for lighting the parish, they derived a

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less amount of benefit from the sewers made and maintained for the drainage of the district than house property, and that they were therefore entitled to have the rate reduced. It was contended, on behalf of the respondents, that the appellants, being rated in respect of property by law rateable to the relief of the poor, and being assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor, and not having shown that they were entitled to any exemption, or reduction, or allowance by law, or by the practice of the separate sewerage Commissioners, within the meaning of the 164th section of stat. 15 & 19 Vict. c. 120., or the 76th section of stat. 11 & 12 Vict. c. 112., were properly rated.

The Quarter Sessions, being of opinion that the appellants derived only half of the benefit in respect of their mains and pipes as compared with other property in the parish, reduced the rate to one half the amount.

If this Court should be of opinion that the Quarter Sessions were empowered to take into consideration the amount of benefit that accrued to the appellants, and to make any reduction on that ground, the order reducing the rateable value of the mains and pipes from 90*l.* to 45*l.* was to stand; otherwise, the original rateable value was to be retained.

J. Clerk, Woollett and R. V. Richards, for the appellants.—The Sessions have found that the property of the appellants, consisting of mains and pipes, derives from the outlay on the sewers only half the benefit which house property in the parish derives, and therefore they were right in reducing the rate on them to one half the original amount. The Metropolis Local Management Act,

18 & 19 *Vict. c. 120. s. 161.*, directs that the sewers rate, lighting rate and general rate "shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor." Sect. 163 provides, "that any sewers rate raised under this Act shall, as regards all land used as arable, meadow, or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground be assessed and levied in the proportion of one fourth part only of the net annual value of such land." And sect. 164 provides "that where any property was at the time of the issuing of the first commission under the said Act of the 11 & 12 *Vict. c. 112.*, entitled to exemption from or to any reduction or allowance in respect of the sewers rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewers rate under this Act." This section shews that the Legislature considered that partial exemptions, reductions, or allowances existed under the old law; and it preserves any exemption or reduction to which property is entitled either by law or by the practice of the separate sewerage Commissioners at the time of the first commission, under the Act for the Metropolitan Commissions of Sewers, 11 & 12 *Vict. c. 112.* Sect. 76 of the last mentioned Act contains a similar proviso to sect. 164 of the other Act, viz., "that where in any separate sewerage district any property is by law or by the practice of the existing commissions or Commissioners of sewers entitled to exemption, wholly or partially, from or to any reduction or allowance in respect of the sewers rate, the Commissioners shall, in making the district sewers rate, observe and allow such exemp-

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1863. tion, reduction, or allowance." And in *The Metropolitan Board of Works v. The Vauxhall Bridge Company* (a), Lord Campbell, delivering the judgment of the Court, said, p. 982, "We therefore cannot judicially determine the great question meant to be submitted to us, whether, under stat. 11 & 12 *Vict. c. 112.*, property is to be rated according to the old established principle of the law of sewers, having regard to the benefit derived from the sewers by the property to be rated, or all property within the district is to be assessed uniformly as for a poor rate or highway rate:" but the Court, solicited by both parties, intimated their opinion upon the question, and Lord Campbell, after reading sect. 76, added, p. 983, "This seems clearly to intimate that, in rating, the benefit derived from the sewers by the property rated shall still be regarded." [Crompton J. I never had this point in my mind as far as I was party to the judgment in that case: I was only present during the first part of the argument.] In *The Overseers of St. Botolph without Aldgate*, appts., *The Board of Works for the Whitechapel District*, respts. (b), which was the case of a cleansing and lighting rate under sect. 158, if the Board had considered that one portion of the district derived less benefit than another, and had made the rate accordingly, this Court would not have interfered with the exercise of their discretion; and, according to the law of sewers, the amount of benefit derived governs the amount of liability. In *Callis on Sewers*, pp. 222-3, 2d ed., it is said, "It may be a grand question, whether these laws of sewers will permit any exemptions to any person or persons, and by the strict penning of the words of this commission, it seems to oppose all such privileges and

(a) 7 E. & B. 964.

(b) 29 L. J. M. C. 228.

discharges, as exemptions be ; The ancient commission which is in the Register, and in *Fitz. Nat. Br.* are exceeding strict." After setting out the words, he proceeds : " And the words in our statute be in effect, ' and all such which reap profit or sustain damage, shall be assessed ; ' which words seem not to admit of discharges : Yet in my opinion out of the strict words of these commissions there be some exemptions, though not expressed in words, yet supplied in reason, and are to be added in construction. First, for the grounds lying between the sea banks and the seas are in reason exempted from the charge of the banks and walls, because they can take no safety thereby. Secondly, those grounds which be upon an ascent, and not on the level, are also by the rule of reason exempted from assesses to be imposed only by the power of these laws." He then gives other examples of exemption. The principle that property benefited in different degrees is to be rated differently was carried out in *Rex v. The Commissioners of Sewers for the Tower Hamlets* (a). Lord Tenterden said, p. 521, " The principle has always been laid down and acted on, that no person is to contribute to the expense except those who derive benefit from it." [*Cockburn C. J. Callis* does not lay down that where property derives some benefit it shall be assessed in proportion to the benefit. The first and second instances he gives are cases in which no benefit is derived.] It would be strange that the superincumbent land should be subject, under sect. 163, to a rate at one-fourth, and that the mains and pipes under it should be rated at the full value assessed in the poor rate. In *Soady v. Wilson* (b) there is only a *semble* in the marginal note that in an action against the Com-

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(a) 9 B. & Cr. 517.

(b) 3 A. & E. 248.

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missioners for levying a rate, if it appeared that they had jurisdiction, this Court would not inquire whether the rate was proportioned to the benefit received from the sewerage by the party rated.

Metcalfe (*Hertslett* with him), for the respondents.— If property within a district derives some benefit from the drainage works, The Metropolis Local Management Act, 18 & 19 Vict. c. 120., prescribes the mode of rating. Sect. 161 directs that the rate shall be assessed upon the net annual value as ascertained by the poor rate; and it is not contended that the mains and pipes of the appellants are not assessable to the poor rate on the full value. Sect. 163 is not applicable to mains and pipes; neither does it direct that the rate shall be in proportion to the benefit derived. The present case is not within any exemption contemplated by the 164th section. *The Metropolitan Board of Works v. The Vauxhall Bridge Company* (a) is distinguishable. Lord Campbell C. J., at the end of the judgment, p. 984, said, "We must refrain from giving any opinion as to whether benefit was derived from the sewers to any or what part of the property, which the Commissioners must be fully competent to determine." And in that case it was contended that the bridge was not within the jurisdiction of the Commissioners. In *Masters v. Scroggs* (b), and *Stafford v. Hamston* (c), the person assessed to the sewers rate received no benefit. The principle that actual benefit received by the property regulates the imposition of the sewers rate was carried out in *Reg. v. The Great Western Railway Company* (d), and *Good-*

(a) 7 E. & B. 964.

(b) 3 M. & S. 447.

(c) 2 B. & B. 691.

(d) E. B. & E. 600.

child, appt., The Trustees of St. John, Hackney, respts. (a) ; though, in the latter case, the tithe commutation rent charge was held exempt from the lighting and sewers rate, under stat. 18 & 19 *Vict. c. 120. s. 161.*, because, in *Hackney*, tithes had not been previously rated to the sewers rate. In *Dorling, appt., The Epsom Local Board of Health, respts. (b)*, where a special district rate was laid on the whole district under sect. 86 of stat. 11 & 12 *Vict. c. 63.*, and a large part of it, owing to the inclination of the ground and the character of the occupation, derived no direct or immediate benefit from the works, it was held that the benefit to the district was the general criterion, though it was discretionary with the Local Board whether they would divide the district under sect. 89. (He was then stopped by the Court.)

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COCKBURN C. J. The result of the discussion is that the order of Sessions must be quashed.

I do not wish to be considered as infringing upon the doctrine laid down in *Callis on Sewers*, that property can only be assessed to a sewers rate if it derives benefit from the sewer. That doctrine was applied by this Court in *The Metropolitan Board of Works v. The Vauxhall Bridge Company (c)*, and I adopt all that was there said by Lord Campbell, which is in effect the doctrine laid down by *Callis*. But when we apply the doctrine practically, I understand that the question of the rateability of a given area to a sewers rate is not to be determined by the accidental and temporary use to which it is applied at the time ; for, owing to the changes

(a) *E. B. & E. 1, 46.*(b) *5 E. & B. 471.*(c) *7 E. & B. 964.*

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which are continually taking place in the suburbs of the Metropolis, where there are open fields, or where a hovel stands to-day, a great mansion may be erected to-morrow ; but by ascertaining whether the property is drained, either immediately or mediately, so as to derive benefit from the drainage works in respect of which the rate is imposed ; and, as soon as the fact of the rateability is established, it is not a question of degree depending upon the particular use to which the premises may for the time be applied. The principle on which the rateability depends is that which the Legislature has established, namely, the value of the premises as assessed to the poor rate: it is not a question of degree with reference to the quantum of benefit which the property derives, but a question of degree with reference to the value of the property. The question of benefit is, indeed, more or less involved in that of value ; because the degree of benefit which property derives from drainage works depends on its value arising from the purposes to which the area may be applied, whether to common agricultural purposes or to buildings. But the quantum of value is a much safer criterion than the precise amount of benefit which the property in its particular state may derive from the sewer ; the determination of which is indeed a matter of almost insuperable difficulty. Therefore I think that, under the circumstances of this case, though I admit the point is not free from difficulty ; rateability to some extent not being in dispute, inasmuch as that fact is involved in the admission that the premises do derive some benefit from the drainage ; the case is not within the principle laid down in *Callis* and in *The Metropolitan Board of Works v. The Vauxhall Bridge*

Company (a), and therefore the appellants are not entitled to any exemption or reduction.

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CROMPTON J. I am of the same opinion. The property of the appellants is to be assessed on its net annual value ascertained by the rate for the time being for the relief of the poor. It may be hard that, when there is only a small portion of land, it is to be assessed, not as so much land, but at the improved value of the land by reason of buildings erected upon it; but that is the general law, and we cannot disturb it. Then the question is, whether the present case comes within the exception in the 163d section of stat. 18 & 19 *Vict. c. 120.*, as to land used as arable, meadow, or pasture ground only, or as woodland, orchard, &c., which are to be assessed at one-fourth only of the net annual value, or within any exemption or reduction referred to in the 164th section. In the former section there is no mention of mains, pipes or anything of that kind; and the only question is how to construe the latter section: "Where any property was at the time of the issuing of the first commission under the said Act of the 11 & 12 *Vict. c. 112.*, entitled to exemption from or to any reduction or allowance in respect of, the sewers rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewers rate under this Act." We are to see whether this reduction can be taken as attached to the use of the property by any law of sewers. It is almost admitted by Mr. Clerk that he could not shew that there was such a law. It is clear that a district not benefited by

(a) 7 *E. & B.* 964.

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the sewer is exempted ; and in *Rex v. The Commissioners of Sewers for the Tower Hamlets* (a) it was held that there may be separate levels under the jurisdiction of one set of Commissioners, for one portion of which they may require one rate and for the other portion a different rate. But there is no case or authority which says that the rate may be reduced by reason of the manner in which a particular part of a field, within the limits of the district drained, is used. And I do not think the reason of the thing would allow a reduction of the rate to be made from time to time according to the use made of the property. Here it is said that because the appellants, though they require draining to some extent, do not for the particular use of one part of their land require the drainage so much as for the other part, there is to be a reduction of the rate on that part. I do not think that is the meaning of the enactment. The criterion is the relation of the drainage to the level of the land. If the drainage of the district is so effected as to benefit that particular field, we cannot inquire into the amount of benefit : the rate cannot vary because at one time the property is used as a garden which the owner would wish to be drained, and at another as a cowhouse or pigsty which requires moisture. According to the argument of Mr. Clerk there would not be a permanent difference : but one which might vary from month to month, and from year to year. But that is not the meaning of the exemption in *Callis*, nor of the two cases on which so much reliance has been placed. I think the meaning of *Callis* is, that if land, by reason of its situation, receives a benefit from the

(a) 9 B. & C. 917.

drainage in a particular district or level, the particular use which is made of the land so benefited is not to be regarded. That is quite consistent with *Rex v. The Commissioners of Sewers for the Tower Hamlets* (a), in which it was held that where there are separate levels in a district under one set of Commissioners, and one level does not derive benefit from the sewers in the others, separate rates should be assessed upon each level. Nor is it inconsistent with anything in *The Metropolitan Board of Works v. The Vauxhall Bridge Company* (b); for when we look at that case we see that the attention of the Court was called to the mode in which the property was situate with reference to the levels and the inclination of the ground, and not to the use which was made of it, and that the rate was not to vary according to the manner in which it was used in different years.

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MELLOB J., having been present during part only of the argument, took no part in the judgment.

Order of Sessions quashed.

(a) 9 B. & C. 517.

(b) 7 E. & B. 964.

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Wednesday,
January 21st.

Order of re-
moval.
9 & 10 Vict.
c. 66. s. 4.

Sickness or
accident pro-
ducing per-
manent dis-
ability.

Appeal to
Quarter Ses-
sions.

The QUEEN *against* The Overseers of the United
Parishes of ST. MARY and ST. ANDREW,
WHITTLESEY.

Where, under the 9 & 10 Vict. c. 66. s. 4., a warrant for the removal of a pauper on account of sickness or accident is granted by justices of the peace, who state therein that they are satisfied that the sickness or accident will produce permanent disability, no appeal lies to the Quarter Sessions against this statement.

CASE from the Quarter Sessions of the Isle of *Ely*.

Two justices of the peace had made an order, under stat. 9 & 10 Vict. c. 66. s. 4., for the removal of *Sarah Oakenfull*, a female pauper, and her two legitimate children, from the parish of the united parishes of *St. Mary and St. Andrew, Whittlesey*, in the Isle of *Ely*, in the county of *Cambridge*, to the parish of *Sharrington*, in the county of *Kent*, being the place of their last legal settlement. The order was made on the ground that they had become chargeable to the former parish in respect of relief made necessary by sickness of the said *Sarah Oakenfull*, and stated that the justices were satisfied, by the evidence before them, that the said sickness of the said *Sarah Oakenfull* was such as would produce permanent disability.

The order of removal, notice of chargeability, and grounds of removal having been duly served, notice of appeal was given, one of the grounds of which was, that the sickness of the pauper was not such as would "produce permanent disability."

When the appeal came on to be heard a preliminary

objection, to which it is unnecessary to refer, was taken by the respondents, and overruled by the Court.

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The Court then proceeded to hear the appeal on the merits, and, the appellants having traversed the allegation contained in the second ground of removal, that the sickness of the pauper, the said *Sarah Oakenfull*, was such as to produce permanent disability, called upon the respondents to prove that allegation. The respondents however contended that the justices who granted the order having, in pursuance of 9 & 10 *Vict. c. 66. s. 4.*, duly stated on the face of it that they were satisfied that the sickness was such as to produce permanent disability, such statement was conclusive, and the Court of Quarter Sessions could not on appeal review their finding.

For the appellants it was contended, that the order of removal was not conclusive as to the question of the permanency of the disability, and that, this part of the respondents' grounds of removal having been traversed by the appellants, the Court of Quarter Sessions had power to decide the question whether the sickness of the pauper was such as to produce permanent disability.

The Sessions held that they had power to determine whether the sickness was such as would in fact produce permanent disability, notwithstanding the statement made by the justices in the order of removal; and medical evidence accordingly was produced by the respondents to prove that the sickness was of such a nature.

The Sessions, after hearing the witnesses, were of opinion that the sickness of the pauper was not such as to produce permanent disability, and on that ground quashed the order of removal.

The questions for the opinion of this Court were:

First. (This question was on the preliminary objection.)

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Secondly. Whether the Court of Quarter Sessions had power to decide, on appeal, whether in fact the sickness of the pauper was such as to produce permanent disability.

If this Court should answer in the negative either of these questions, then the order of Sessions was to be quashed and the original order of removal confirmed.

If this Court should be of opinion that both these questions were to be answered in the affirmative, then the order of Sessions quashing the order of removal was to be confirmed.

Orridge, in support of the order of Sessions.—The 9 & 10 *Vict. c. 66. s. 4.* enacts, “No warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability.” The Court of Quarter Sessions has power to review the decision of justices, that the sickness under which a pauper labours is one that “will produce permanent disability.” In *Reg. v. The Inhabitants of Prior’s Hardwick* (a), indeed, *Patteson J.* said, p. 171, “The Sessions cannot entertain the question whether the sickness was or was not likely to be permanent. It is for the removing justices to certify as to that, on the face of their order;” but that was not the point in that case. [*Crompton J.* The statute does not say that the pauper shall not be removed unless the sickness will produce permanent disability—it only says that the justices shall certify that fact. They may be mistaken, still the pauper would be removable. Whether sickness will

(a) 12 *Q. B.* 168.

produce permanent disability is a speculative question.] The order of removal is an *ex parte* proceeding; for the justices have only before them the person making the complaint. [*Crompton J.* If the justices decided that the sickness would *not* produce permanent disability their decision would be conclusive; why then should their decision not be conclusive when it is the other way?] The object of the Legislature was to prevent persons being removed who laboured under merely temporary sickness. If the decision of the justices is conclusive, the pauper is deprived of his right of appeal. [*Mellor J.* Is there any instance where this has been made the subject of appeal?] The practice varies at different Sessions. An appeal lies against the decisions of justices under the statute which renders penal in the metropolis the unlawful possession of stolen property: 2 & 3 *Vict. c. 71. ss. 24. 50.*

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Keane and *Markby*, *contra*, were not called on.

COCKBURN C. J. Stat. 9 & 10 *Vict. c. 66. s. 4.* does not take away any power of appeal on grounds like the present, for before it there was none. The fact of the sickness or accident being such as "will produce permanent disability" is a condition annexed to the jurisdiction of the justices in these cases. If the Legislature had made the permanency of the illness a condition precedent to the validity of their warrant the case would have been different. On this ground, therefore, the order of Sessions must be quashed.

CROMPTON and MELLOR JJ. concurring,

Order of Sessions quashed.

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Tuesday,
January 27th.

CROFT *against* The LONDON and NORTH WESTERN
Railway Company.

*Railway.
Compensation.
Damage fore-
seen.
Agreement of
reference, arbi-
tration and
deed of grant.
Lands Clauses
Consolidation
Act, 1845,
8 & 9 Vict.
c. 18. s. 68.*

A railway Company were authorized by Act of Parliament to construct a branch railway tunnel under land on part of which were erected a manufactory and buildings connected therewith, of which *K.* was owner in fee. In 1848, *K.* made a claim against the Company for compensation under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The claim was referred to arbitration; and on the 6th April, 1848, the arbitrators made an award, by which, after reciting that it had been agreed that the amount to be paid "for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said branch railway or tunnel, and in full compensation for all damage or injury to be sustained by reason of the construction" thereof, should be left to arbitration, they awarded that the Company should pay unto *K.* the sum of 126*l.* "as compensation for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said tunnel, and in full for compensation for all damage and injury sustained by him by the construction thereof." By deed of grant, dated November 7th, 1848, reciting, among other things, the passing of the special Acts of Parliament relating to the railway, and the agreement to refer, and the award, *K.*, in consideration of the sum therein mentioned, which he acknowledged to be "in full for the purchase of the site of, and the right to construct, maintain, and use the said tunnel underneath the pieces or parcels of land and hereditaments," granted to the Company "the site of, and full and free liberty, power and authority to bore, dig out, excavate, make, and construct the said branch railway or tunnel" underneath the said pieces or parcels of land, "together with the full, free, exclusive and uninterrupted right and liberty, at all times for ever hereafter, to use, enjoy, uphold, maintain and repair the tunnel and branch railway, and the site thereof," to hold the said liberty and all other the premises "for the purposes of the several Acts of Parliament relating to the said railway, freed and discharged from all claims and demands whatsoever of or by" *K.* his heirs, &c. Subsequently the branch railway or tunnel was opened for traffic in 1849, and serious injuries were from time to time sustained by the buildings and the manufactory caused by the subsidence of the surface consequent upon the construction of the tunnel in such a soil (the stratum through which it passed at this point of its course, and upon which the premises stood, consisting of clay and loose earth), and by the vibration resulting from the passing of heavily laden and other trains along the tunnel, "or by one of such causes." Held:

1. That *K.* could maintain no action against the Company.
2. That *K.* was not entitled to compensation under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 68.

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THIS was an action to recover damages for injury to buildings of the plaintiff caused by the construction of a railway tunnel of the defendants, and by their working of their railway in and through that tunnel; and under the Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court, without pleadings.

By stat. 8 & 9 Vict. c. cxxiii., *The Liverpool and Manchester Railway Company* were authorized to extend their stations and works in *Liverpool*, and to make a branch railway or tunnel from *Edgehill* to *Waterloo Road*, in *Liverpool*.

By stats. 8 & 9 Vict. c. cxcviii. and 9 & 10 Vict. c. cciv., *The London and North Western Railway Company* were authorized to carry out the powers and provisions contained in the first mentioned statute.

These three Acts of Parliament were to be taken as forming part of the case.

The branch railway or tunnel called the *Victoria Tunnel* was constructed by *The London and North Western Railway Company*, under the provisions of the above mentioned Acts of Parliament, and was opened for traffic about the month of *August*, 1849.

At the time of the passing of the above mentioned Acts of Parliament and of the construction of the tunnel, and down to the year 1850, *Edward Kilshaw* was the owner in fee (subject to certain mortgages and leases) of a soap manufactory and buildings connected therewith, situate in *Gascoyne Street*, *Vauxhall Road*, in the borough of *Liverpool*, in the county of *Lancaster*. The *Victoria Tunnel* passes through the south west corner

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of the premises in *Gascoyne Street*, formerly used as a soda, ash, and soap manufactory.

The total area of the premises in *Gascoyne Street*, upon which a manufactory formerly stood, together with dwelling houses and shops fronting into *Vauxhall Road*, is about 1600 square yards. The area of that portion of those premises under which the tunnel passes is about 120 square yards.

The stratum through which the tunnel passes at this part of its course, and upon which the above mentioned premises stand, consists of clay and loose earth.

In 1848, *E. Kilshaw* (the then owner of the premises above mentioned) made a claim under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 68., against *The London and North Western Railway Company* for compensation for the right to construct the tunnel underneath his premises, and for the site of the tunnel, and also for damage caused by the construction of the same.

This claim was referred to arbitration, and on the 6th April, 1848, the arbitrators made the following award :—

“ To all to whom these presents shall come, We, *J. A. P.*, of &c., *J. D.*, of &c., and *P. E.*, of &c., send greeting. Whereas by an agreement bearing date the 4th March last, and made between *H. Booth*, Esq., on behalf of *The London and North Western Railway Company* of the one part, and *E. Kilshaw*, of &c., of the other part ; reciting that under the provisions of an Act passed in the Session of Parliament, 1845, *The Liverpool and Manchester Railway Company* were authorized to extend their stations and works in *Liverpool*, and to make a branch railway or tunnel from *Edgehill* to *Waterloo Road*, in *Liverpool* aforesaid ; and reciting that by two

Acts of Parliament, the one passed in the said Session of 1845, and the other in the Session of 1846, *The London and North Western Railway Company* were authorized to carry out the powers and provisions contained in the first mentioned Act as effectually as could have been done by *The Liverpool and Manchester Railway Company*; and also reciting that the said branch railway or tunnel passed underneath the property described in the plan attached, and signed by the said *H. Booth*; and further reciting that it had been agreed that the amount to be paid to the said *E. Kilshaw* for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said branch railway or tunnel, and in full compensation for all damage or injury to be sustained by reason of the construction thereof, should be left to arbitration as thereafter mentioned: It is by the now reciting presents agreed that it should be referred to the award of the said *J. A. P.* on behalf of the said *London and North Western Railway Company*, and of the said *J. D.* on behalf of the said *E. Kilshaw*, and in case they could not agree, such third person as should be appointed either before or after entering upon the said reference by the said *J. A. P.* and *J. D.* or any, two of them, to determine and ascertain the amount to be paid by the said railway to the said *E. Kilshaw* for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said branch railway or tunnel, and in full compensation for all damage or injury to be sustained by him by reason of the construction of the said

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tunnel underneath the said hereditaments and premises.

And it was thereby mutually agreed that the decision and award of the said three arbitrators, or of any two of them, should (whether such third arbitrator should or should not be appointed or join in such award or not) be final and conclusive upon the said *London and North Western Railway Company* and the said *E. Kilshaw*, and that each of them on their respective parts would abide by and perform the award of the three arbitrators or any two of them, if made in writing, within one calendar month from the date thereof; and that the said arbitrators should be at liberty to examine the said *E. Kilshaw* and his witnesses, and the witnesses of the said Company, upon oath or solemn declaration, or without, if they thought fit; and that the arbitration intended by that agreement should be proceeded with upon three clear days notice given by either party to the other, and that if either party should neglect or decline to proceed therein, or should not attend such appointment after such notice should have been given, then it should be competent to the other party and such of the said arbitrators as should attend such appointment to proceed ex parte; and further, that that agreement might be made a rule or order of any of Her Majesty's Courts at *Westminster*, at the instance of either party, and that the arbitrators should have the powers and authorities of arbitrators appointed under the provisions of The Lands Clauses Consolidation Act. And whereas the said *J. A. P.* and *J. D.*, in pursuance of the power and direction given to them by the above recited agreement, did, before they proceeded on the said reference, appoint the said *P. E.* as third arbitrator therein. Now know ye that we the said *J. A. P.*, *J. D.* and *P. E.*, having

taken upon ourselves the burden of making this our award, and having heard and duly considered all the allegations in evidence of the respective parties to the above recited agreement as to the amount of compensation to be paid by the said Company to the said *E. Kilshaw*, for the right to construct the said branch railway or tunnel underneath the said hereditaments and premises therein referred to and described in the plan thereunto annexed, and for the purchase of the site thereof, and the compensation for all damage and injury done to the said hereditaments and premises by the construction thereof; and further, having previously viewed, inspected, and carefully examined the same, do thereupon make this our award in writing of and concerning the same in manner and form following (that is to say): We the said *J. A. P.*, *J. D.* and *P. E.*, the said arbitrators, do find and award, and have determined and ascertained the amount to be paid by the said *London and North Western Railway Company* to the said *E. Kilshaw* as compensation for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and as purchase money for the site of the said tunnel, and in full for compensation for all damage and injury sustained by him by reason of the construction thereof, to be 126*l.*: we the said arbitrators do order and award that the said *H. Booth*, for and on behalf of the said *London and North Western Railway Company*, shall and will pay unto the said *E. Kilshaw*, his executors or administrators, the said sum of 126*l.* sterling, as compensation for the right to construct and maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site

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of the said tunnel, and in full for compensation for all damage and injury sustained by him by the construction thereof, and that the sum of 126*l.* shall be received by the said *E. Kilshaw*, his executors or administrators, in full for such right and compensation as aforesaid. In witness" &c.

On the 7th November, 1848, *E. Kilshaw* and his mortgagees, *G. Casson* and *W. Casson*, executed a deed of grant to *The London and North Western Railway Company*, which ; after reciting that *E. Kilshaw* was seised in fee of the hereditaments and premises thereafter described, subject to certain mortgages for securing the principal sum of 4,000*l.*, and further reciting the passing of stats. 7 *G.* 4. c. xlix., by which *The Liverpool and Manchester Railway Company* were incorporated ; 8 & 9 *Vict.* c. cxxiii. ; 3 & 4 *W.* 4. c. xxxiv., by which *The Grand Junction Railway Company* was incorporated ; 8 & 9 *Vict.* c. cxviii., "An Act for consolidating *The Bolton and Leigh, The Kenyon and Leigh Junction, The Liverpool and Manchester, and The Grand Junction Railway Companies*" ; 9 & 10 *Vict.* c. cciv., "An Act to consolidate *The London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies*," whereby the several Companies were dissolved, and a new Company was incorporated, by the name of *The London and North Western Railway Company*, and all the railways and works, and all the lands, tenements, rights, powers and privileges of or belonging to the dissolved Companies, were vested in *The London and North Western Railway Company* ; and by the said Act it was enacted that all works which, under the provisions of the several Acts relating to the dissolved Companies or any of them, and which those Companies were authorized or required to

execute or complete, and which had not been already executed or completed, might be executed or completed, as the case might be, by the Company thereby incorporated, and that the same Company should, in every such case, have and be entitled to all such power for executing and completing such works as the dissolved Company or Companies were entitled to under the said Acts, and as fully as if the Company thereby incorporated had been originally authorized and required to execute and complete the same works; and that the clauses, provisions, powers and authorities, contained in the Act or Acts authorizing the execution or completion of such works for purchasing and taking land and in relation thereto, and to the conveyance of such land, and the payment and application of the purchase money thereof, should remain in force and be applicable to all land which might be required to be taken for the purposes of such execution and completion, and should be construed and taken as if the Company thereby incorporated were named in such Act or Acts instead of the Company or Companies thereby respectively authorized; and further reciting that the branch railway or tunnel authorized by the recited Act of 9 *Victoria* passes underneath the pieces or parcels of land and hereditaments thereafter described, or some part or parts thereof, according to the plans in the margin of those presents, and which said hereditaments and premises were numbered respectively B. 44, and C. 39, in the parish of *Liverpool*, in the plan and book of reference of the branch railway or tunnel deposited with the clerk of the peace of *Lancaster*; and that it was by agreement referred to the award of *J. A. P.* and of *J. D.*, and of an

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umpire to be appointed by them in case of difference, to determine the amount to be paid to the said *E. Kilshaw* for the purchase of the site of, and the right to construct and for ever maintain, the said branch railway or tunnel underneath the said pieces or parcels of land and hereditaments, and in full compensation for all damage or injury to be sustained by him by reason of the construction of the said tunnel underneath the said hereditaments and premises; and the arbitrators, together with *P. E.* the umpire appointed by them, did by their award determine that the Company should pay unto *E. Kilshaw*, for the right to construct and for ever maintain the branch railway or tunnel underneath the hereditaments and premises situate in *Gladstone Street* and coloured blue upon the plan thereupon endorsed, and thereon numbered C. 39, and for the purchase of the site of the tunnel, and in full for compensation for all damages and injury to be sustained by him by reason of the construction of the branch railway or tunnel underneath the said hereditaments and premises, the sum of 60*l.* 10*s.*; and that the Company should also pay unto *E. Kilshaw* for the right to construct and for ever maintain the tunnel underneath the hereditaments and premises situate in *Gascoyne Street*, and coloured red upon the plan thereupon endorsed, and thereon numbered B. 44, and for the purchase of the site of the tunnel underneath the same premises, and in full for compensation for all damages and injury to be sustained by reason of the construction of the branch railway or tunnel underneath the last mentioned hereditaments and premises the sum of 126*l.*; and that it had been agreed that the sum of 160*l.*, part of the purchase or compensation sums so awarded to be paid to

E. Kilshaw, should be paid to *G. Casson* and *W. Casson* in part discharge of the principal money secured to them by their mortgage securities, and they had agreed to join in those presents, &c.: WITNESSED that, in consideration of the sum of 160*l.* sterling to *G. Casson* and *W. Casson* paid by the Company (at the request and by the direction of *E. Kilshaw*), the receipt of which sum of 160*l.* in part satisfaction of their mortgage debt and in full discharge of the rights and premises thereby granted and assured from the whole of their mortgage securities *G. Casson* and *W. Casson* did thereby acknowledge, and thereupon for ever release the Company, their successors and assigns, and *E. Kilshaw*, his heirs, executors and administrators, *G. Casson* and *W. Casson*, by the direction of *E. Kilshaw*, did thereby grant and release, and in consideration of the aforesaid sum so paid to *G. Casson* and *W. Casson* and of the further sum of 26*l.* 10*s.* (making together the total sum of 186*l.* 10*s.*) to *E. Kilshaw*, the receipt whereof and that the same sums were in full for the purchase of the site of and the right to construct, maintain, and use the said tunnel underneath the pieces or parcels of land and hereditaments therein after described, *E. Kilshaw* did thereby acknowledge, and therefrom did thereby release the Company, their successors and assigns, *E. Kilshaw* did thereby grant, release, ratify and confirm unto the Company, their successors and assigns, the site of, and full and free liberty, power and authority to and for the Company, and their deputies, servants, agents, engineers, surveyors and workmen, and others by their authority, to bore, dig out, excavate, make, and construct the said branch railway or tunnel underneath all that piece or parcel of land, and the buildings thereon

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1868. <hr style="width: 100px; margin: 0;"/> CROFT v. LONDON and NORTH WESTERN Railway Company.	<p> situate, on the west side of <i>Gladstone Street</i>, in <i>Liverpool</i> aforesaid, containing in front to the street 21 feet and 1 inch and at the back 21 feet and 2 inches, and on the north and south sides severally 32 feet, be the several dimensions thereof a little more or less, which piece or parcel of land was described by the plan thereupon endorsed, and distinguished by being coloured blue, and thereon numbered C. 39; and also underneath all that other piece or parcel of land, and the buildings then standing thereon, situate on the north side of <i>Gascoyne Street</i>, in <i>Liverpool</i> aforesaid, which piece or parcel of land and hereditaments was described on the plan indorsed on those presents and distinguished by being coloured red, and thereon numbered B. 44: together with the full, free, exclusive and uninterrupted right and liberty, at all times for ever thereafter, to use, enjoy, uphold, maintain and repair the said tunnel and branch railway and the site thereof, and all the exclusive right and advantage thereof, and all the estate, right, title and interest in and to the same and every part thereof; To hold the said liberty, privilege, and all and singular other the premises thereinbefore granted or otherwise assured or intended so to be, unto the Company, their successors and assigns, thenceforth for ever, for the purposes of the several Acts of Parliament relating to the said railway, freed and discharged from all claims and demands whatsoever of or by <i>G. Casson</i>, <i>W. Casson</i> and <i>E. Kilshaw</i>, or any of them, their or any of their heirs, executors, administrators or assigns, and freed and discharged of and from the said mortgage securities and the said principal sum of 4000<i>l.</i> and all interest for the same." [Then followed the usual covenants by <i>G. Casson</i> and <i>W. Casson</i> against incum- </p>
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brances, and by *E. Kilshaw* for title, quiet possession, further assurance, and production of title deeds.]

In 1853, *Thomas Croft*, the plaintiff in this action, being a creditor of *E. Kilshaw*, became by purchase the owner in fee of all the above mentioned premises. Subsequent to the dates of the above mentioned award and deed of grant, and after the plaintiff came into possession of the premises, serious injuries were from time to time sustained by the buildings and the manufactory. The walls and brickwork were fractured in some places, and bulged out and thrown out of perpendicular in others. These injuries were caused by the subsequent subsidence of the surface consequent upon the construction of the tunnel in such a soil as hereinbefore mentioned, and by the vibration resulting from the passing of heavily laden and other trains along the tunnel, or by one of such causes. In the beginning of the year 1859, the buildings of the manufactory in *Gascoyne Street* had, from these causes become so dilapidated that proceedings under The *Liverpool* Health of Town and Buildings Regulation Act, 1842, were taken by the Corporation authorities. At the Court of Quarter Sessions for the borough of *Liverpool*, held in *April*, 1859, the grand jury made a presentment that the premises in *Gascoyne Street* were in a ruinous and dangerous condition. The Corporation authorities accordingly caused the roofs to be taken off and the walls to be in part taken down. The premises were thus laid waste, and rendered wholly unfit for occupation.

The questions for the opinion of the Court were: First, whether, upon the facts stated an action could be maintained against the defendants.

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Secondly, whether the plaintiff was entitled to compensation under the 68th section of The Lands Clauses Consolidation Act, 1845.

If the Court should be of opinion in the affirmative upon either of these questions, then judgment should be entered for the plaintiff for a sum to be afterwards ascertained, with costs of suit.

If the Court should be of opinion in the negative upon both questions, then judgment of nonsuit, with costs of defence, should be entered up for the defendants.

Bovill (*Quain* with him), for the plaintiff.—The question is, whether the plaintiff is entitled to compensation for the injury done to his buildings since the making of the award in *April*, 1848, either by action or by proceeding under The Lands Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 18*. Though the agreement of reference uses the term “damage or injury to be sustained,” the sum of 126*l.* awarded to the plaintiff by the award included only compensation “for all damage and injury sustained by him” by the construction of the railway and tunnel. The plaintiff has not been, in fact, nor in contemplation of law can he be, deemed to have been compensated for damage done since the award. The arbitrators could not foresee that damage would arise to the buildings from the vibration caused by the running of the trains through the tunnel. And they could not, under stat. 8 & 9 *Vict. c. 18. s. 68.*, assess compensation for contingent future damage; *Lee v. Milner* (a), per Lord

(a) 2 *M. & W.* 824, 838, 843, 844. See the observations upon *Lee v. Milner*, by Erle C. J., in *Chamberlain v. The West End of London and Crystal Palace Railway Company*, in Exch. Chamber, 2 *B. & S.* 617, 638.

Abinger and Alderson B. [He also cited *In re Ware and the Regent's Canal Company* (a), and *Lawrence v. The Great Northern Railway Company* (b), and *The Lancashire and Yorkshire Railway Company v. Evans* (c), per Sir John Romilly M. R.; *The London and North Western Railway Company v. Bradley* (d), *Bagnall v. The London and North Western Railway Company* (e).] [*Welsby*, contra.—In the last case the injury was not damage sustained by the plaintiffs, as mine owners, from the execution of the works of the Company; and the mines were not opened when the railway was being made. *Cockburn C. J.* In *Bonomi v. Backhouse* (f) it was held by the Court of Exchequer Chamber, and affirmed by the House of Lords (g), that the right of action for working mines without leaving proper support did not accrue to the plaintiff as owner of a house until actual damage had occurred.] In *Chamberlain v. The West End of London and Crystal Palace Railway Company* (h) the damage could be foreseen, and had actually commenced at the time of the arbitration.

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Welsby (*Little* with him).—The defendants purchased from the predecessor of the plaintiff the right to maintain the tunnel with all risk of damage to the landowner from the use of it. The recital in the agreement of reference is, “that it had been agreed that the amount to be paid to the said *E. Kilshaw* for the right to construct and for ever maintain, the said branch

(a) 9 *Exch.* 395.(b) 16 *Q. B.* 643. 652.(c) 15 *Beav.* 322. 330.(d) 3 *Mac. & G.* 336.(e) 7 *H. & N.* 423, affirmed on error, 1 *H. & C.* 544.(f) *E. B. & E.* 622. 646.(g) 9 *H. L.* 503.(h) 2 *B. & S.* 605, affirmed on error, *Id.* 617.

1863. railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said branch railway or tunnel, and in full compensation for all damage or injury to be sustained by reason of the construction thereof," should be left to arbitration. This was a voluntary reference; and the agreement is larger in its terms than it could have been under The Lands Clauses Consolidation Act, 8 & 9 *Vict. c. 18. s. 68.*, which uses the phrase for land "taken and injuriously affected." [*Cockburn C. J.* If the arbitration had been under that statute, the statute would have superadded the right to use and maintain the tunnel; and the same question would have arisen, viz., "What must be taken to have been included in the compensation awarded"? The parties are therefore in the same situation as if the agreement of reference and award had been under that statute.] If that be so, the damage from the subsidence of the soil, and from the vibration caused by the running of trains, supposing the latter recoverable under *stat. 8 & 9 Vict. c. 18. s. 68.*, which is doubtful,—*Re Penny and The South Eastern Railway Company (a)*, per Lord Campbell,—might have been inquired into before the arbitrators; *The East and West India Docks and Birmingham Junction Railway Company v. Gattke (b)*, distinguishing *The London and North Western Railway Company v. Smith (c)*. In *The Lancashire and Yorkshire Railway Company v. Evans (d)*, and the other cases cited for the plaintiff, the damage was matter of pure speculation. In the present case the tunnel was in the course of construction, and the nature of the traffic and of the engines and trains on the defendants'

(a) 7 *E. & B.* 660. 672.(b) 3 *Mac. & G.* 155. 163.(c) 1 *Mac. & G.* 216.(d) 15 *Beav.* 322.

line of railway was well known. The terms of the award are as large as those of the agreement; and the deed carries out the award, and conveys to the defendants everything which could be made the subject of compensation before the arbitrators.

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Quain (*Bovill* absente), in reply.—In *Re Penny and The South Eastern Railway Company* (a) the inquiry before the sheriff's jury was, whether the lands of the claimant had been injuriously affected "by the execution of the works of the Company." [*Crompton J.* In that case Lord *Campbell* had a strong opinion, p. 672, that the damage arising from vibration, caused by the running of trains after the completion of the railway, was not matter of compensation, at all events under the precept issued in that case, which was for past injury. *Mellor J.* In *Rex v. Pease* (b) a nuisance to the public arising from the ordinary transaction of the business of a Company, authorized by an Act of Parliament, was held to be not indictable. The damage in the present case must have been contemplated by the parties: trains cannot pass along a line of railway without some vibration. *Cockburn C. J.* If the arbitration fails, compensation is to be assessed by the intervention of a jury; and, by sect. 49 of The Lands Clauses Consolidation Act, 1845, "where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done," the jury are to deliver their verdict separately for the value of the land and for the compensation: there is no provision for summoning a jury to inquire into or give compensation for injury afterwards arising.

(a) 7 E. & B. 860.

(b) 4 B. & Ad. 30.

1863.	This scheme of proceeding shews that it is to be one final
CROFT	assessment of compensation. Suppose, in the present
v.	case, the matter had gone to a jury, and they had
LONDON	assessed compensation for injury done and to be done,
and	how could the claimant afterwards have another jury,
NORTH	and how can we send the case back to arbitrators?]
WESTERN	That depends upon whether this is damage which could
Railway	be taken into account upon the first inquiry as being
Company.	foreseen and not speculative.

COCKBURN C. J. I am of opinion that our judgment ought to be for the defendants; and I found my view of the case on the several provisions for compensation to be found in The Lands Clauses and Railways Clauses Consolidation Acts, 1845, 8 & 9 *Vict. cc.* 18, 20.

By the special Acts which are to be read in connection with the general Acts, powers are given to take, without their assent, the lands of owners for the purposes for which the special Acts are passed. Then comes the provision for compensation, which is to be twofold—compensation for the value of land taken, and compensation for injury or damage accruing from the execution of the works of the railway to the owners of the land taken in respect of lands adjacent. If the parties can agree upon the value of the land to be taken, and the amount of compensation in respect of the damage which will accrue to the lands adjacent, there is no necessity for further litigation. Supposing they cannot agree, it is at the option of the owner of the land to have the matter settled by arbitration, or by the verdict of a jury, provided he gives the necessary notice to the Company: if he does not give that notice, the Company are to issue their warrant to the sheriff to

summon a jury, who are to settle by their verdict, with the assistance of the sheriff, the amount of compensation for the value of the land taken, and for lands injuriously affected. There is no provision for any other than one single inquiry; nor any provision for future damage, not contemplated by the parties at the time of the assessment of compensation by the jury, or not inquired into before them. If it had been intended that the inquiry should be renewed in case the damage, which, at the time of the first inquiry, might be speculative, was subsequently realised, there would have been some provision to that effect. But, so far as we can gather from the language of the various enactments relating to the assessment of compensation, the Legislature contemplated that compensation should be settled once for all. And therefore if, before a jury who might have been summoned in the present case, or if before the arbitrators (for the proceeding before either tribunal involves the same inquiry), the amount of damage which would accrue to the adjacent buildings in consequence of the excavation and of the vibration arising from the passing of trains through the tunnel could have been ascertained, it would have been a proper matter to be inquired into, and the jury or the arbitrators might have been called upon to assess compensation in respect of it. The Act of Parliament gives railway Companies an absolute power to take land, and provides that the landowner shall have compensation for the value of the land taken, and for the injury to be done to adjoining lands by reason of the railway works. The compensation must be recovered in the mode provided by the Legislature; and it would harass Companies most grievously if they

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were to be subject to litigation for any unforeseen damage arising after compensation had been assessed. The Legislature did not contemplate that railway Companies should remain liable to litigation for such compensation for all time to come. There may be cases of damage not foreseen, or which might be considered speculative at the time of the inquiry before the jury or the arbitrators, and therefore no compensation would be given for it; but the balance of advantage is, I think, in favour of the owners whose land is taken, rather than of the railway Companies who are called upon to make compensation. It is not, however, for us to speculate how that may be: we are only to see what the Legislature has provided. Here, the amount of compensation having been ascertained by arbitrators, it is proposed to reopen the question; and to give to the plaintiff, either by fresh arbitration or by action, damages which might have been assessed under the first inquiry. That cannot be done. Although damage arising from negligence on the part of the Company in the execution of works is the subject matter of an action, when a party asks for compensation under sect. 68 of stat. 8 & 9 *Vict. c. 18.*, the damages which might have been ascertained on the first inquiry cannot afterwards be recovered.

CROMPTON J. I also am of opinion that our judgment ought to be for the defendants. The injuries in question are not very distinctly brought before us, because it is said that they were caused either by the subsidence of the surface consequent upon the construction of the tunnel in the particular soil, and by the vibration resulting from the passing of heavily laden and other

trains along the tunnel, "or by one of such causes;" and it is stated that the plaintiff is to succeed if compensation for these injuries could be recovered either by action or under sect. 68 of The Lands Clauses Consolidation Act, 1845.

The construction of the tunnel was authorized by the special Act, and the passing of trains through it was a thing necessary under the powers of that Act; and therefore no action could be maintained for injuries arising from these causes except there was negligence in the Company.

Then, can compensation be recovered as for an unforeseen mischief? These injuries must have been in the contemplation of the parties, and are foreseen damages; and, as far as such damages are concerned, there is to be one inquiry, and compensation is to be given once for all. We need not now consider the case of speculative damages arising from some act of the Company, the effect of which could not be known or looked for at the time of the inquiry. This being an inquiry as to the amount of compensation to be given for the right to tunnel under land, I cannot conceive but that the landowner, asking for compensation, would say, "Though only a few feet of our land are tunnelled through, the buildings adjacent will be damaged, and we must have a considerable price for that." That was the principle acted upon by the Court of Exchequer in *Re Ware and The Regent's Canal Company* (a), which is the strongest case in favour of Mr. Bovill's argument. We have nothing to do with the application of the principle in that case,—whether according to the facts it was properly considered a case of unforeseen damages.

(a) 9 Exch. 395. 402.

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The present case clearly ranks itself under the class of foreseen damages ; and I agree with the Lord Chief Justice that, when the damage can be ascertained at the time of the inquiry, there can be no further compensation.

That the parties in the present case contemplated damage to the surface of the land, and that they must also have contemplated damage from the use of the railway caused by vibration as well as from the soil being weakened by boring a tunnel through it, I think is made clear, as Mr. *Welsby* argued, by reference to the agreement of reference and the deed of grant ; though neither of them is strictly under The Lands Clauses Consolidation Act, 1845—the appointment of the arbitrators being different, and, to some extent, the subject-matter also. The agreement recites that the amount to be paid by the railway Company was to include “full compensation for all damage or injury to be sustained” by the landowner by reason of the construction of the tunnel. It is said that the words “to be” are left out in the award ; but I think the phrases “sustained” and “to be sustained” are used in the agreement and in the award, respectively, in the same sense. However that may be, neither phrase is used in the deed, which is drawn so as to exclude all questions of this kind. I think the deed has the meaning put upon it by Mr. *Welsby* : the landowner grants “the site of and full and free liberty, power and authority . . . to bore, dig out, excavate, make, and construct the said branch railway or tunnel,” “together with the full, free, exclusive and uninterrupted right and liberty, at all times for ever, thereafter to use, enjoy, uphold, maintain and repair the said tunnel and branch railway and the site thereof :” to hold the same,

"thenceforth for ever, for the purposes of the several Acts of Parliament relating to the said railway, freed and discharged from all claims and demands whatsoever" of or by the mortgagees and the landowner. It seems to me that, under this grant, independently of the Act of Parliament, the Company take power to do all these acts as having an easement, or some interest, in the soil ; and that no action can be maintained against the Company for using the land in a manner authorized by the deed, except in the case of negligence. The Company may have taken the deed in this shape in order to avoid all question about fresh compensation.

I think that these subsequent accidents must be taken to have been the foreseen consequences of the works, and therefore were matters which might have formed the subject for compensation before the arbitrators, and that such compensation as the plaintiff was entitled to should then, once for all, have been awarded. I also think more strongly that our judgment should be for the defendants, because they have taken their powers under this deed of grant, which excludes the plaintiff from the compensation which he now claims.

MELLOR J. I also am of opinion that our judgment ought to be for the defendants. It is not necessary to decide some of the questions which have been raised : and I am far from saying that in some instances a jury might not be summoned to assess compensation for damage which could not be foreseen at the time of the first inquiry, either before a jury, or before arbitrators, and which afterwards resulted. But the statement in this case is that the injuries "were caused by the

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subsidence of the surface consequent upon the construction of the tunnel in such a soil as hereinbefore mentioned, and by the vibration resulting from the passing of heavily laden and other trains along the tunnel, or by one of such causes." Now, so far as the excavation of the tunnel was concerned, the damage must have been well known; and the case finds that the injury "arose from the construction of the tunnel in such a soil." The use to which the tunnel was to be applied was also well known; and the damage caused by vibration resulted from the ordinary working of their line of railway by the plaintiffs. All these results then were reasonably to be anticipated at the time of the arbitration. If the question rests upon the deed,—the recital of the agreement of reference in it is very strong. It is that the parties had agreed to refer "the amount to be paid to the said *E. Kilshaw* for the purchase of the site of, and the right to construct and for ever maintain, the said branch railway or tunnel underneath the said pieces or parcels of land and hereditaments, and in full compensation for all damage or injury to be sustained by him by reason of the construction of the said tunnel underneath the said hereditaments and premises." I do not say that I am very clear that this carries the case farther than the provisions of The Lands Clauses Consolidation Act, 1845. But looking to sect. 49, of that statute the jury are not only to give the value of the land and compensation for the damage to be sustained by reason of severance, but also for the damage to be sustained by "otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." The section, there-

fore, contemplates some consequential damage likely to arise from the execution of the works which is to be taken into consideration by the jury. And this appears to me to be precisely a case in which the damage now sought to be recovered must have been taken into consideration by the arbitrators, when they made their award under the terms of the reference. Therefore, basing my opinion on the special facts of this case, I am of opinion that our judgment ought to be for the defendants.

Judgment for the defendants.

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RE CREEK.

Monday,
January 12th.

Occupation of an attorney's office entitles a person to be a burgess, and therefore qualified to be elected councillor of a borough within The Municipal Corporations Act, 5 & 6 W. 4. c. 76. s. 9., which requires occupation of a "house, warehouse, counting house, or shop."

Attorney's
office.
Councillor of
borough.
Municipal
Corporations
Act, 5 & 6
W. 4. c. 76.
s. 9.

MANISTY moved for an information in the nature of a quo warranto, calling on an attorney of the name of *Creek* to shew by what authority he exercised the function of councillor of the borough of *Burnley*, to which he had been elected. The objection was that he had not occupied any "house, warehouse, counting house, or shop" within the borough, as required of a burgess by The Municipal Corporations Act, 5 & 6 W. 4. c. 76. s. 9. *Creek*, with his partner, occupied, within the borough, the entire of a building used by them as an attorney's office.—The terms "house" and "shop," must be understood to mean "house" and "shop" in their ordinary signification, and do not comprise an "office." [*Mellor J.* The Reform Act, 2 & 3 W. 4. c. 45. s. 27.,

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vests the right of voting for members of parliament for boroughs in persons "who shall occupy &c. any house, warehouse, counting house, shop, or other building." The present point has never arisen hitherto. [*Cockburn C. J.* Attorneys have always voted in respect of their offices. *Crompton J.* In note (d) to this section in *Chitty's Statutes*, by *Welsby* and *Beavan*, vol. 1, p. 810, 2d ed., I find: "The omission of the words 'or other building,' which are in the twenty-seventh section of The Reform Act, has got rid of a prolific source of difficulty in the revising Courts. The effect, however, has been to exclude the occupiers of large buildings, such as a range of stables, slaughter houses, detached attorneys' offices, breweries, &c., a consequence probably not contemplated by the framers of this section." *Cockburn C. J.* This seems to come under the expression "counting house:" an attorney usually has mortgages and such like in his office. *Crompton J.* An attorney must keep books of account.]

Per CURIAM. (COCKBURN C. J., WIGHTMAN, CROMPTON and MELLOR JJ.)

Rule refused.

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JACOMB, Clerk to the MOLD GREEN Local Board,
appellant, DODGSON, respondent.

Wednesday,
January 21st.

*Public Health
Act, 11 & 12
Vict. c. 63.
Local Govern-
ment Act,
21 & 22 Vict.
c. 98.
11 & 12 Vict.
c. 43. s. 11.
Information
before justices.
Limitation of
time.
Recovery of
apportionment.*

By The Public Health Act, 1848, 11 & 12 *Vict. c. 63. s. 68.*, the management of all streets being highways, within any district, is vested in the Local Board of Health; and by sect. 69, in case any street, not being a highway, is not sewered &c. to the satisfaction of that Board, it may, by notice in writing, require the owners or occupiers of the premises fronting &c. upon it to sewer &c. the same within a specified time; and if this is not complied with, that Board may execute the works, and the expences shall be paid by the owners in default, and either be recovered in a summary manner, or declared to be private improvement expenses. By sect. 129, all damages, costs and expenses recoverable under that Act are made recoverable before two justices of the peace. The Local Government Act, 1858, 21 & 22 *Vict. c. 98. s. 4.* enacts that it shall be construed together with the former Act, and be deemed part of it. Sect. 62 enacts, that where the Local Board has incurred expences for which the owners of premises are made liable, they may be recovered from the owner when the works are completed," and shall be a charge on the premises and bear interest till payment, and in all summary proceedings by a Local Board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. And by sect. 63, the apportionment of expences by the Local Board shall be binding and conclusive on every such owner unless, within three months from the time of notice given of the amount, he shall dispute it by written notice. By 11 & 12 *Vict. c. 43. s. 11.* it is provided that, in all cases where no time is limited for making complaints or laying informations before justices of the peace, they shall be made or laid within six calendar months from the time when the matter of such complaint or information arises. A street being out of repair, the Local Board of Health gave notice to the owners of the adjoining houses to repair it; and, on this not being complied with, executed the works, and gave notice of the expences and apportionment to each of the owners. The owners gave no notice of disputing the apportionment, and, at the end of the three months limited by 21 & 22 *Vict. c. 98. s. 63.*, the Board made a demand of the amount. The owners having refused to pay, and the expences not having been declared to be private improvement expences: Held that the Board had six months from the expiration of the three months during which the apportionment might have been disputed to take proceedings before justices of the peace for the recovery of the amount.

CASE stated by justices of the peace under 20 & 21
Vict. c. 43.

In the year 1858 The Local Government Act, 1858, was adopted in the District of *Mold Green*. After this a part of a certain street or road within that District

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JACOMB
v.
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called *Storth's Road* (not being a highway), was not sewered, levelled, paved, flagged and channelled to the satisfaction of the Local Board for the District. Thereupon the Local Board served, on 22d *February*, 1861, upon the respondent (amongst other owners) the following notice:—

“Public Health Act, 1848, and Local Government Act, 1858, 11 & 12 *Vict. c. 63. s. 69.*, and 21 & 22 *Vict. c. 98. s. 28.* Notice of the Local Board on owners or occupiers of premises fronting, adjoining or abutting on streets, or parts of streets, not being highways, and not sewered, levelled, paved, flagged, channelled, or lighted, metalled and made good to the satisfaction of the Local Board. To *Samuel Dodgson*, an owner or occupier of land, buildings or premises situate at *Storth's Road*, within the District of the *Mold Green* Local Board, and being a street or road extending from near the long bridge in a north direction, all within the said District.

Whereas the street called *Storth's Road* is not sewered, levelled, paved, flagged, channelled, lighted, metalled and made good to the satisfaction of the above named Local Board: The said Local Board do hereby give you notice, as owner or occupier of land, buildings or premises, being premises fronting, adjoining or abutting on a part of such street requiring to be sewered, levelled, paved, flagged, channelled, lighted, metalled or made good, within the space of one calendar month from the service of this notice upon you, to sewer, level, pave, flag, channel, light, metal or make good so much of the said street as the said premises front, adjoin to or abut upon. If you fail to comply with this notice within such time, the said Local Board may, if they shall think fit, execute the said sewerage, paving, flagging, channel-

ling, lighting, metalling or making good, and the expences incurred by them in so doing must be paid by you, together with the other owners and occupiers in default, according to the frontage of your and their respective premises, and in such proportion as shall be settled by the surveyor of the said Local Board, or in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), or by two justices in the manner provided by The Public Health Act, 1848, and The Local Government Act, 1858, and your proportion of such expences may be recovered from you, as one of such owners or occupiers, in a summary manner, or the same may be declared, by order of the said Local Board, to be private improvement expences, and your proportion thereof be recoverable from you, as such, in the manner provided in the said Public Health Act and Local Government Act. Dated this 9th day of *February*, 1861.

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"Fredk. Willm. Jacomb, Clerk."

This notice was not complied with by any of the owners; and the Local Board thereupon executed the works mentioned or referred to in it, and incurred certain expences in so doing.

The respondent was the owner of certain premises abutting upon the said street or road, and the proportion of the expences, calculated by the surveyor of the Board according to the frontage of the respondent's said premises, was therein set forth to be 15*l.* 8*s.* 8½*d.* Notice thereof was given to the respondent, on the 1st *July*, 1861, of which the following is a copy:—

"Mold Green Local Board,

"Mr. Samuel Dodgson, "Huddersfield, 1st July, 1861.

"Dear Sir,—I am desired to inform you that your

1863. proportion of the expences in respect of sewerage, level-
 JACOMB ling, paving, flagging, channelling, lighting, metalling
 v. or making good of part of *Storth's Road* within the
 DODGSON. District of the above Board, and for the repayment
 whereof the owners of the premises in respect of which
 the same are incurred are liable, has been fixed by Mr.
J. H. Abbey, the surveyor of the Board, at 15*l.* 8*s.* 8½*d.*

"The amount becomes a charge on the premises, with
 5*l.* per cent. interest thereon, until payment. It dis-
 charges, however, the owners from any future liability
 in respect of maintaining the works so executed, as they
 thenceforward become repairable by the public. By
 reason of the Board having procured the *Huddersfield*
 Improvement Commissioners to repair part, the cost has
 been much less than would otherwise have been the
 case.

"Yours obediently,

"*Fredk. Willm. Jacomb.*"

The respondent did not give notice of disputing the
 apportionment made under the 21 & 22 *Vict. c. 98. s. 63.* :
 so, at the expiration of the three months, payment of the
 amount was demanded by *William Heppenstall*, the col-
 lector of the Board from the respondent, who, on the 3d
March, 1862, refused to pay the same, and thereupon
 the Local Board (the said expences not having been
 declared to be private improvement expences) took pro-
 ceedings under The Public Health Act for the recovery,
 in a summary manner, of the amount, with interest at
 the rate of 5*l.* per cent. per annum, amounting in all
 to the sum of 15*l.* 19*s.* 4½*d.* Accordingly, upon the
 12th *March*, 1862, a. information was laid before a
 justice of the peace for the West Riding of the county
 of *York*, by the appellant *Frederick William Jacomb*,
 clerk to the Local Board, and who laid such in-

formation as such clerk and on behalf of the Local Board.

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This information came on to be heard on the 15th *March* before two justices. The respondent, having been duly summoned, attended by his attorney. The following is a copy of the summons:—

“West Riding of *Yorkshire*, to wit. To *Samuel Dodgson*, of *Leeds Road*, in the West Riding of the county of *York*, manufacturing chemist.

Whereas information hath this day been laid before me, the undersigned, one of Her Majesty’s justices of the peace, acting in and for the West Riding of the county of *York*, that you, being the owner of certain property, situate at *Dalton*, in the said Riding, within the limits of the *Mold Green* Local Board, have refused or neglected to pay the sum of 15*l.* 8*s.* 8½*d.*, being your proportion of the expences incurred by the said Local Board in sewerage, levelling, paving, flagging and channelling a certain part of *Storth’s Road*, within the District aforesaid, together with the sum of 10*s.* 8*d.*, being the interest due thereon from the 1st day of *July* last, contrary to the statute in such case made and provided.

These are therefore to command you, in Her Majesty’s name, to be and appear, on *Saturday*, the 15th day of *March* instant, at 10 o’clock in the forenoon, at the Court House in *Huddersfield*, in the said Riding, before such justices of the peace for the said Riding as may then be there, to answer to the said information, and to be further dealt with according to law.

“Given under my hand and seal, at *Huddersfield* aforesaid, the 12th *March*, 1862.

“*Geo. Armitage.*” (L. s.)

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On behalf of the respondent it was contended that it appearing by the notice that the works were completed the 1st of *July*, 1861, the information ought have been laid within six months from the time of the work being completed for which such expences had been incurred, in the manner provided by The Public Health Act, 1848. The summons, and also sect. 1 of 11 & 12 *Vict. c. 43.*, were read in support of the argument. On this ground it was urged that the jurisdiction of the justices was ousted.

In answer to the respondent's arguments, the appellant relied upon the 62d section of The Local Government Act, 1858, as specially limiting the time within which the summary proceedings before the magistrates should be brought.

The justices dismissed the information, upon the ground that the objection of the respondent was fatal and it was afterwards agreed that the appellant might state a case to this Court.

The question for the opinion of the Court was, whether the decision of the justices in dismissing the information on the ground aforesaid was right in point of law.

Maule, for the appellant.—The proceedings of The Board of Health were taken in due time.

The Public Health Act, 1848, 11 & 12 *Vict. c. 63. s. 68* enacts that the management of all present and future streets, being highways within any district, shall vest in and be under the management and control of the Local Board of Health.

By sect. 69, "in case any present or future street, or any part thereof, (not being a highway), be not sewered



levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and, if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein; and the expences incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last mentioned owners in a summary manner, or the same may be declared by order of the said Local Board to be private improvement expences, and be recoverable as such in the manner hereinafter provided."

Sect. 129. "In all cases in which the amount of any damages, costs, or expences is by this Act directed to be ascertained or recovered in a summary manner the same may be ascertained by and recovered before two justices, together with such costs of the proceedings as the justices may think proper; &c."

By The Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 4., it is enacted:—"This Act shall be construed together with and be deemed to form part of The Public Health Act, 1848: Words used in this Act shall be interpreted in the sense assigned to them in the said Public Health Act: Bye-laws framed under this Act

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shall be subject to confirmation, enforced, and dealt with in all other respects as bye-laws under the said Public Health Act; and the provisions of each of the said Acts shall, so far as may be consistent with the provisions of this Act, respectively be applicable to all matters and things arising under the other Act."

Sect. 38 extends the powers given to Local Boards by 11 & 12 Vict. c. 63. s. 69. to providing the means of lighting, metalling, or making good streets &c., and extends the powers of both enactments to parts of streets.

Sect. 62. "Where the Local Board have incurred expences, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expences have been incurred, in the manner provided by the Public Health Act, 1848, and such expences shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5 per cent. per annum till payment thereof. In all summary proceedings by a Local Board for the recovery of expences incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand."

Sect. 63. "Notwithstanding anything in the Public Health Act contained, in all cases where by such Act the Local Board shall have incurred expences, for the repayment whereof the owners of the premises for or in respect of which the same are incurred is made liable

by The Public Health Act, 1848, or any Act incorporated therewith, or by this Act, and such expences have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless, within the expiration of three months from the time of notice being given by the Local Board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same."

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By 11 & 12 *Vict. c. 43.*, commonly called *Jervis's Act*, with respect to summary convictions and orders, sect. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

The Board of Health had no power to compel payment until the 1st *October*, 1861, the expiration of three months from the demand made, and consequently this information on the 12th *March* following was in time, as being within six months from the time when the matter of complaint arose, which is the period allowed by 11 & 12 *Vict. c. 43. s. 11.* [He was then stopped.]

Dowdeswell, contra.—The time for taking proceedings ran from the notice of the apportionment among the owners of the charge assessed by the Local Board of Health, namely, on the 1st *July*, 1861, and therefore the 12th *March* 1862 was too late to prefer this information.

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Stat. 21 & 22 *Vict. c. 98. s. 62.* makes the sum apportioned a debt bearing interest, and the circumstance that the apportionment might have subsequently been appealed against does not alter its character in effect, any more than an appeal in any other case affects the act appealed against. [*Wightman J.* Could this sum have been recovered within the three months given by sect. 63 of that Act?] Yes. The proceeding is for the recovery of a debt, not a penalty. *Eddleston, appt., Francis, resp. (a),* is an authority. [*Mellor J.* That case was under the 51st section of stat. 11 & 12 *Vict. c. 68.*, and is therefore inapplicable here.]

COCKBURN C. J. The stat. 11 & 12 *Vict. c. 43. s. 11.*, called *Jervis's Act*, to which our attention has been drawn, governs this case, and its effect is not altered by stat. 21 & 22 *Vict. c. 98.* The intention and effect of the former enactment was to fix a period of limitation within which the right given by Acts of Parliament to enforce matters by orders of justices of the peace and summary convictions shall be resorted to. It is very reasonable there should be some period of limitation in such cases, and six months is that which the Legislature has sanctioned. The intention and effect of the statute further appears to me that there shall be six months, running from the time when the remedy could have been enforced, *i. e.*, when the cause of complaint arose. Here a period of three months is given during which the parties affected by the order and apportionment may give notice of disputing it; and, so long as those three months are running, the Board of Health cannot enforce payment by any owner in the parish of expences allotted to be paid.

(a) 7 C. B. N. S. 568.

by him,—during that period their remedy is in abeyance. And to hold that those three months are part of the six months given by stat. 11 & 12 *Vict. c. 43. s. 11.* would be to place cases under The Public Health Act, 1848, in a different position from all other cases under *Jervis's Act*. Unless we can see our way to make such a remarkable exception we ought not to make it. It is clear that this money was due, and the respondent ought to have paid it: it is also clear that the Board of Health could not have enforced payment during three months out of the period which elapsed before application was made by them to the justices; and we cannot hold that those three months form any portion of the period of time limited by stat. 11 & 12 *Vict. c. 43. s. 11.*

The justices were therefore wrong, and our judgment must be for the appellant.

WRIGHTMAN J. I agree with the rest of the Court in giving judgment for the appellant, and this decision is consistent both with the law and the justice of the case.

CRUMPTON J. I am of the same opinion, for the reasons given by the Lord Chief Justice.

MELLOR J. concurred.

Judgment for the appellant.

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Monday,
January 28th.

BOULDING *against* TYLER.

County Court
Act, 13 & 14
Vict. c. 61.
s. 11.
Costs.
Payment of
money into
Court.

Where a plaintiff takes out of Court in satisfaction of his demand a sum of money which has been paid into Court by the defendant, he does not "recover" that sum within the meaning of the County Court Act, 13 & 14 Vict. c. 61. s. 11.; and consequently, if the sum does not exceed 20*l.*, he is deprived of his costs by that enactment.

THIS was an action to recover a sum not exceeding 20*l.*, in which the defendant pleaded payment into Court of the sum demanded, and the plaintiff took it out in satisfaction of his demand. The Master having, on the authority of *Chambers v. Wiles (a)*, taxed the plaintiff his full costs,

R. E. Turner, on the 15th *January*, obtained a rule to review the taxation, on the ground that money taken out of Court was not a *sum recovered* within the County Court Act, 13 & 14 Vict. c. 61. s. 11., which enacts, that, "if in any action &c., in any of Her Majesty's superior Courts of Record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, &c., the plaintiff shall have judgment to recover such sum only, and no costs, &c."—He cited *Parr v. Lillycrap (b)*, decided upon this statute, and *Robertson v. Sterne (c)*, decided on The *London Small Debts Act*, 15 & 16 Vict. c. lxxvii.—The case had been before *Wightman J.* at Chambers, who referred the parties to the Court.

(a) 24 *L. J. Q. B.* 267; 1 *Jur. N. S.* 475.

(b) 1 *H. & C.* 615.

(c) 31 *L. J. C. P.* 362; 9 *Jur. N. S.* 332.

Gadsden shewed cause.—The term “recover” in this statute means to recover by any judgment or process of the Court. The cases on the authority of which the rule was granted are no doubt against the plaintiff; but they are at variance with the considered decision of *Coleridge J.*, in the Bail Court, in *Chambers v. Wiles* (a), and that of *Platt B.*, at Chambers, in *Power v. Jones* (b), together with the practice founded upon them; as well as with the decisions in *Davey v. Renton* (c) and *Brooks v. Rigby* (d), on the 43 *G. 3. c. 46. s. 3.* [*Crompton J.* In the cases under 43 *G. 3. c. 46. s. 3.*, the defendant paid money into Court, under a Judge’s order, without any act on the part of the Court. In this case, according to the present practice, the payment of money into Court was *pleaded*. When the plaintiff takes that money out he makes a judgment for himself.]

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R. E. Turner was not called on to support his rule.

COCKBURN C. J. The policy of the enactment before us was to prevent persons bringing certain forms of action in the superior Courts for sums not exceeding 20*l.* The plaintiff in such a case, by taking a less sum out of Court in satisfaction of his demand, admits that his claim is for a sum not exceeding 20*l.*, and consequently ought to lose his costs. Two Courts, the Common Pleas and Exchequer, the former in a considered judgment, have so decided, and I am satisfied that their

(a) 24 *L. J. Q. B.* 267; 1 *Jur. N. S.* 475.

(b) 15 *Jur.* 242, part 2.

(c) 2 *B. & C.* 711.

(d) 2 *A. & E.* 21.

1863. decision is sound. The cases relied on by the plaintiff were earlier.

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WIGHTMAN, CROMPTON and BLACKBURN JJ. concurring,

Rule absolute (a).

(a) See *Beard v. Perry*, 2 B. & S. 493.

Tuesday,
January 20th.

ASHPITEL, executor of JAMES PETO, against
BRYAN.

Estoppel.
Bill of ex-
change.
Acceptor.
Denial of
indorsement.

Declaration by the executor of *B.* upon a bill of exchange purporting to be drawn by *A.* and accepted by the defendant, and indorsed by *A.* to *B.* Plea, that *A.* did not indorse the bill. It appeared that *A.*, who was possessed of goods, being the stock in trade upon his premises, died intestate and indebted to the defendant and other persons; and it was arranged between *B.* and the defendant, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and indorsed by *A.* The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and indorsed to the plaintiff by procuration in the name of *A.*, and accepted by the defendant. Held, that the defendant could not be allowed to set up as a defence to the action that the bill was not indorsed by *A.*

THIS was an action by the plaintiff, as executor of *James Peto.*

The first count of the declaration stated that, in the lifetime of *James Peto*, on the 22d May, 1857, *John Peto*, by his bill of exchange, since overdue, directed to the defendant, required the defendant to pay to his order 376*l.* 2*s.* 3*d.*, at sixty days sight, and the defendant then accepted the bill, and *John Peto* indorsed the same to *James Peto* in his lifetime, but the defendant had not paid the same. There were also counts for goods sold, money paid and money lent by *James Peto* in his lifetime; and on accounts stated between *James Peto*, in his

lifetime, and the defendant; and a count upon accounts stated between the plaintiff, as executor of *James Peto*, and the defendant.

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First plea to the first count. That *John Peto* did not indorse the bill as alleged.

Second plea to the same. That the bill was drawn, indorsed and accepted, for the accommodation of *James Peto*, and without value or consideration, &c.

Third plea to the same. That the bill was made and indorsed in the name of *John Peto* after his decease, and the defendant was induced to accept the bill after the decease of *John Peto* through the fraud of *James Peto*, deceased, who, in his lifetime, always held, and the plaintiff has always held, and still holds, the same, without any value or consideration.

Fourth plea to the same. That *John Peto*, in his lifetime, carried on a trade, and was possessed of goods, being his stock in the said trade, of the value of 376*l.* 2*s.* 3*d.*, and, before the drawing, indorsing or accepting of the bill, died intestate, and indebted to the defendant and other persons; and, at the time of the drawing, indorsing and accepting of the bill, it was intended and expected by the next of kin of *John Peto*, of whom the defendant and *James Peto* were two, that *James Peto* should apply for and obtain letters of administration of the estate and effects of *John Peto*, and by and out of the said estate and effects pay the debts of *John Peto*, and it was proposed by *James Peto* that the defendant should take and convert to his own use the said stock in trade as if the same had been sold and delivered to him by *John Peto* in his lifetime, and that the defendant should accept a bill of exchange for 376*l.* 2*s.* 3*d.*, purporting to be drawn and indorsed by *John Peto*, and that *James*

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Peto should procure himself to be appointed administrator; and thereupon *James Peto* caused and procured the bill of exchange in the first count mentioned to be drawn and indorsed in the name of *John Peto*, deceased, and the defendant accepted the same with the intention and belief, and for the sole consideration, that *James Peto* should and would so apply for and obtain letters of administration, and become and be duly qualified and empowered, as administrator, to adopt, ratify and confirm, and would, as administrator of the estate and effects of *John Peto*, deceased, ratify and confirm the said transaction, as a sale and purchase to and by the defendant of the said stock in trade at and for the price of 376*l.* 2*s.* 3*d.*, and apply the same in payment of the debts of *John Peto*, and for the purpose of enabling *James Peto*, deceased, the better to sue for and recover the value of the said stock in trade whenever and so soon as, but not before, he should have become such administrator. And the defendant took and converted the said stock as aforesaid; and which said stock never was, nor was any part thereof, at any time, in the possession, order, disposition or control of *James Peto*, and there never was any other consideration or value whatever for the drawing, indorsing or accepting of the bill of exchange other than the expectation and intention that *James Peto* should procure himself to become such sole administrator as aforesaid, and so adopt, ratify and confirm as aforesaid. And *James Peto* always held, and the plaintiff still holds, the bill without any value or consideration, other than as before mentioned. And *James Peto*, although a reasonable time in that behalf had elapsed long before his death, never did apply for or obtain letters of administration, nor did he ever become

the administrator of the estate and effects of *John Peto*, deceased, but wholly neglected and omitted so to do, and the defendant remains and is liable to account to the creditors, and to the lawful administrator of *John Peto*, deceased, whenever he shall be appointed, touching the said intermeddling of the defendant with the stock in trade of *John Peto*, deceased, and to pay to the creditors, or to such administrator, the sum of 376*l.* 2*s.* 3*d.*, or the value of the stock in trade, less the amount of a certain set off, in respect of certain debts and sums of money due and owing to the defendant from *John Peto* in his lifetime, at the time of his death, so far as the same may be lawfully set off.

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Fifth plea, to the residue of the declaration. Never indebted.

Issues were joined on the above pleas; and there was also a demurrer to the fourth plea, and joinder therein.

Second replication to the first plea, setting out the bill of exchange, and averring, among other things, that the bill was indorsed and delivered to the plaintiff at the same time and in the same handwriting at and in which the bill was drawn, and that the drawing and indorsing took place before the bill was accepted by the defendant, of all which the defendant had notice and knowledge at the time of the acceptance, and that, by reason of the premises, the defendant was estopped from denying the indorsement of the bill.

There was a similar replication to the third plea; with an averment that, as to so much of that plea as alleged fraud and want of consideration, the plaintiff denied the same.

Rejoinder to the second replication to the first plea. That, before the drawing, or indorsing, or accepting, of

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the bill, as *James Peto* and *George William Collins* well knew, *John Peto* died, and afterwards, and when they well knew of the death of *John Peto*, *George William Collins*, by the procurement of *James Peto*, and without any authority from *John Peto*, or his executor or administrator, drew and indorsed the bill in the name of *John Peto*; and *James Peto*, before and at the time when the defendant accepted the bill, and the same was delivered to him, well knew that the drawing and indorsing were false and fictitious, and therefore the defendant is not estopped as alleged.

There was also a demurrer to that replication, and joinder therein.

There was a similar rejoinder to the second replication to the third plea.

Also a demurrer to that replication, and joinder therein.

There were demurrers to the rejoinders, and joinder therein.

On the trial, before *Mellor J.*, at the Sittings in *London* after *Trinity Term*, 1862, the plaintiff produced the bill of exchange declared upon, of which the following is a copy:—

“£376. 2s. 3d.

“*London, May 22d, 1857.*

“At sixty days sight, pay to my order three hundred and seventy six pounds two shillings and three pence, for value received.

“*John Peto,*

“*Mr. John Bryan,* “*p. pr. Geo. Wm. Collins.*”
“*Dacre Street, Westminster.*”

Indorsed, “Pay Mr. *James Peto*, *Ockham.*

“*John Peto,*

“p. pr. *Geo. Wm. Collins.*”

It appeared that *Collins* made and indorsed the bill in the lifetime and in the presence of *James Peto* and

the defendant; and that the defendant, on the same occasion, in the presence of *Collins* and *James Peto*, accepted the bill. *John Peto* had died about a fortnight before, and *Collins*, *James Peto* and the defendant knew that fact and all the other circumstances relating to the drawing, indorsing and accepting of the bill.

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From 1851 to 1856, *John Peto* and the defendant carried on business in copartnership as curriers and army contractors. In 1856, that partnership was dissolved by their bankruptcy. After having obtained certificates *John Peto* carried on the currier's part of the former business, and the defendant carried on the army contractor's part of the business, on different parts of their former premises, but not in partnership. *Collins* was the clerk of *John Peto* and the defendant, in their partnership business, before their bankruptcy. He then became the clerk of *John Peto*, in his currier's business, and so continued until the death of *John Peto*.

John Peto died on the 7th *May*, 1857, intestate, leaving goods, being the stock in trade on his premises, which were valued by *Collins* at 376*l.* 2*s.* 8*d.*

The defendant's wife was first cousin of *John Peto*, and niece of *James Peto*. The plaintiff was nephew and executor of *James Peto*.

After some discussion between *James Peto*, who had assisted *John Peto* with advances of money, and the defendant, it was arranged that the defendant should take possession of the goods of *John Peto*, and give *James Peto* his acceptance for their value. Thereupon *Collins* delivered the goods to the defendant, with an invoice made out in the name of *John Peto*; and the bill declared upon was drawn and indorsed by him, and accepted by the defendant, in the presence of *James Peto*.

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It was alleged by the defendant that *James Peto* had undertaken to take out letters of administration to *John Peto*, and so enable himself to confirm the transaction by which the defendant had become possessed of the goods of *John Peto* as a sale of them to him, and apply the purchase money in payment of the debts of *John Peto*; and that *James Peto* never took out letters of administration to *John Peto*.

James Peto died in 1860, and on the plaintiff, as his executor, demanding payment of the amount of the bill, with interest, the defendant paid interest on account.

Some letters between the attorneys of the plaintiff and the defendant, and between the plaintiff and the defendant, were put in evidence, which it is not necessary to set out.

It was contended for the defendant, in support of his first plea, that there was no evidence of an indorsement of the bill of exchange by *John Peto*.

The learned Judge was of opinion that there was evidence of an indorsement by *John Peto*, and that the fact of his being dead at the time when the indorsement was made was not material: and he put the following questions to the jury. First. Whether the acceptance by the defendant to the bill of exchange was written before or after the indorsement to *James Peto*. Second. If they should be of opinion that the acceptance was so written before the indorsement, then whether the indorsement was with the authority and concurrence of the defendant. Third. Whether the bill was drawn and accepted for goods belonging to *John Peto*, deceased, and for no other consideration. Fourth. Whether *James Peto* ever agreed with the defendant to take out letters of administration to *John Peto*.

The jury found, as to the first question, that the acceptance was made after the indorsement. As to the second question they did not return any answer. As to the third question the jury found that the bill was given for goods of *John Peto* belonging to him, and his stock, and for no other consideration. And as to the fourth question, they said No; it was an after-thought.

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The Judge then put to the jury, the following questions. Whether *James Peto* ever had any actual control or possession of the goods. To this they answered No, he affected to deal with them.

Did he ever take any other possession than affecting to deal with the goods? The jury answered No.

The learned Judge then directed the verdict to be entered for the plaintiff, with leave reserved to move to enter the verdict for the defendant: the defendant undertaking not to go to a Court of appeal without the permission of the Court: the Court to be at liberty to draw inferences as a jury, and to have power to amend the record.

In *Michaelmas* Term (Nov. 6th), 1862,

Rochfort Clarke obtained a rule nisi accordingly, on the ground of misdirection. And it was ordered that the rule and the demurrers should come on for argument together.

The case was argued in this Term (Jan. 16th and 20th).

Garth, (*Hayes* Serjt. with him), for the plaintiff.—
 First. The defendant is estopped from setting up, as a defence, that *John Peto*, being dead, could not have

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indorsed the bill. When the defendant accepted the bill, he knew all the facts of the transaction, and is estopped from saying that the bill is not a bill, or that it had not been indorsed by *John Peto*. In *Byles on Bills*, 184, 8th ed., it is said:—"By acceptance, the drawee admits the signature, and capacity of the drawer, and cannot, after thus giving the bill currency, be admitted to prove that the drawer's signature was forged. He moreover admits, and so does the maker of a promissory note, the then capacity of the payee, to whose order the bill or note is made payable, to indorse. Hence, the acceptor is estopped from saying that the payee being a bankrupt could not indorse;" citing *Drayton v. Dale* (a), and *Braithwaite v. Gardiner* (b). And "where the bill is drawn in a fictitious name, the acceptor undertakes to pay to an indorsement in the same hand," citing *Cooper v. Meyer* (c), *Beeman v. Duck* (d), &c. In *Cooper v. Meyer*, Lord *Tenterden* said, p. 471, "The acceptor ought to know the handwriting of the drawer, and is, therefore, precluded from disputing it; but it is said that he may, nevertheless, dispute the indorsement. Where the drawer is a real person, he may do so; but if there is, in reality, no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed for the drawer." The drawing and indorsing of the bill in the present case was, in effect, a drawing and indorsing by a fictitious person; and therefore it is within the authority of *Cooper v. Meyer* (c); and it is a stronger case than that,

(a) 2 B. & C. 293.
 (c) 10 B. & C. 468.

(b) 8 Q. B. 473.
 (d) 11 M. & W. 251.

because the defendant saw the acts of drawing and indorsing. [*Wightman J.* referred to *Gibson v. Minet (a)*, in the House of Lords, affirming the judgment of the Court of King's Bench (*b*).]

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Secondly. The 4th plea is bad, on the ground that, as the defendant, under the arrangement mentioned in it, has had the benefit of the goods, it shews only a partial failure of consideration and is no answer to the claim on the bill. Also it has been negatived by the jury. [*Wightman J.* The main question arises on the first plea.]

Rochfort Clarke (Hawkins with him).—The defendant is not estopped from shewing that the indorsement of the bill was in the name of a deceased person, and therefore void. The acceptor cannot traverse the drawing of a bill, which is part of it; but he may traverse an indorsement upon it; and, the plaintiff having taken issue upon such a traverse, this issue must be found, according to the truth. On the declaration the indorsement appears to have been subsequent to the drawing, and there is no estoppel against the defendant unless it is pleaded: *Bowman v. Taylor (c)*, *Bowman v. Rostron (d)*. [*Mellor J.* Is not the defendant equally estopped in point of evidence?] The doctrine of estoppel by misrepresentation of facts was stated for the first time by Lord Deaman in *Pickard v. Sears (e)*, and adopted by Parke B. in *Freeman v. Cooke (f)*:—"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on

(a) 1 H. B. 569.

(b) 3 T. R. 481.

(c) 2 A. & E. 278.

(d) 2 A. & E. 295 note (b).

(e) 6 A. & E. 469. 474.

(f) 2 Exch. 654. 662, 663.

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that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But that doctrine does not apply where both parties knew the real facts of the transaction, and there was no deception. [*Crompton J.* referred to *Ex parte Swan (a)*.] In *Freeman v. Cooke*, p. 662, *Parke B.* said:—"With respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable a jury to treat it as no contract." In such a case there is no estoppel: the maxim *Qui facit per alium facit per se* applies. And, in p. 663:—"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." But in that case, which was an action of trover by the assignees of a bankrupt for seizing the bankrupt's goods under a *fieri facias* against *J. B.* and *B. B.*, it was held that the assignees were not estopped from claiming the goods, notwithstanding the finding of the jury that the bankrupt represented to the officer that the goods were the goods of *B. B.*, so as to induce him, by that false representation, to seize the goods. And, when the doctrine is

(a) 7 C. B. N. S. 400.

applied to mercantile instruments, it does not go farther than the old doctrine of estoppel by deed. In *Bowes v. Foster* (a) the plaintiff, for the purpose of protecting his goods against any creditor who might issue execution against them, agreed with the defendant that there should be a pretended sale of the plaintiff's goods to him, and, for this purpose, an invoice was made out, and a receipt given by him to the defendant for a sum therein stated to be the purchase money, and possession of the goods was delivered to the defendant, who employed an auctioneer to sell them; in an action to recover the value of the goods it was held that the defendant was not estopped, by his assent to the particular transaction, from shewing the true state of facts. [*Wightman J.* In that case third persons were affected. He referred to *Sanderson v. Collman* (b).] In that case, which was an action by indorsees against the acceptors of a bill of exchange, to a plea, denying that the bill was made as alleged in the declaration, there was a replication by way of estoppel that, at the time the defendants accepted the bill, the same purported to have been made and to have been signed as alleged, and that the plaintiffs, at the time the bill was indorsed as in the declaration mentioned, had no notice or knowledge that it was not made as alleged, and that they gave value for the same upon the faith and credit of the defendants' acceptance. [*Wightman J.* The averments in the replication supplied the ingredients of the estoppel in *Pickard v. Sears* (c).] *Sanderson v. Collman* (b) only shews that an acceptor cannot deny the drawing of the bill: there is no case which shews that he cannot deny an indorsement on

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(a) 2 H. & N. 779.

(b) 4 M. & Gr. 209.

(c) 6 A. & E. 469.

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it. [*Crompton J.* In *Beeman v. Duck* (a) there is a direct dictum of *Parke B.* on that point: referring to the argument for the defendant that, although an acceptor was estopped from denying the authority to draw, his acceptance did not prevent him from disputing the authority to indorse, he says, p. 255: "We cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of *Cooper v. Meyer*" (b).] In *Beeman v. Duck* (a) there was a misleading of an innocent indorsee for value. And in all the other cases the bill was in the hands of an indorsee for value who did not know the real circumstances. [*Crompton J.* The case of bills of exchange is rather within the class of cases in which parties have agreed to a particular state of facts. As where a warehouseman has agreed to hold goods for A., though he may be aware that the property is in another person he cannot afterwards deny that the goods are A.'s.]

Further, this bill cannot be declared on as a bill payable to the order of a person who was dead at the time when the bill was drawn: it should have been declared on as payable to bearer. [*Wightman J.* According to *Gibson v. Minet* (c), in the House of Lords, if a bill of exchange be drawn in favour of a fictitious payee, and the name of such payee be indorsed on it by the drawer, which fictitious indorsement purports to be to the drawer himself, or his order, and the acceptor

(a) 11 M. & W. 251.

(b) 10 B. & C. 468.

(c) 1 H. Bl. 570.

at the time of accepting the bill knew those facts, he shall not take advantage of his own wrong, but a bonâ fide holder for value may recover against the acceptor.] There could be no indorsement of this bill by *John Peto*; consequently, this is a fictitious bill, not merely a bill with a fictitious name on it, and therefore is void: *Bennett v. Farnell* (a), *Hunter v. Jeffery* (b). [Crompton J. In those cases, which arose out of the bankruptcy of *Livesay & Co.* and *Gibson & Co.* (see 1 *Camp.* 133, note), there was no estoppel.]

Further, there was no value or consideration for the defendant's acceptance; *Nelson v. Serle* (c). *James Peto* never had actual possession of the goods of *John Peto*, and had no right to them. The defendant would have no defence to an action by the legal representative of *John Peto* on the ground that *James Peto* had made himself executor de son tort, because one act does not make a person executor de son tort; *Mountford v. Gibson* (d). The whole transaction was illusory; and no right of either party was affected by it. The jury ought to find the truth: that *John Peto* did not indorse.

[He also contended that the replications to the first and third pleas were bad, because, the bill being drawn and indorsed by procuration, they did not shew that *Collins* had authority to draw or indorse; citing *Alexander v. Mackenzie* (e). Mellor J. referred to *Smith v. Marsac* (f).]

Garth, in reply, abandoned the demurrers to the 1st plea and to the rejoinders.

(a) 1 *Camp.* 130.

(c) 4 *M. & W.* 795.

(e) 6 *C. B.* 766.

(b) 2 *Peake*, 146.

(d) 4 *East*, 441

(f) 6 *C. B.* 486.

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WIGHTMAN J. This is an action, brought by the executor of *James Peto* against the defendant, the acceptor of a bill of exchange, which, upon the face of it, appears to have been drawn by *John Peto* by procuration, and by which *John Peto* requested the defendant to pay to his order 376*l.* 2*s.* 3*d.* at sixty days sight. The defendant accepted the bill, and *John Peto* indorsed it by procuration to the plaintiff's testator. To the declaration there is a plea that *John Peto* did not indorse the bill as alleged.

Upon the evidence and the findings of the jury, it appears that *John Peto*, who, on the face of the bill, is the drawer and indorser by procuration, was, at the time, dead; but certain goods belonged to him, with respect to which there was a claim on the part of *James Peto*, whether, as the probable personal representative of the deceased, or as having some interest in them upon dealings between him and *John Peto*, in his lifetime, is not clear. These goods were taken possession of by the defendant, with the consent of *James Peto*; and, by arrangement between *James Peto* and the defendant, it was agreed that the bill should be drawn in the name of *John Peto*, though dead, and indorsed also in his name, and the defendant accepted the bill so drawn and indorsed: the defendant clearly had a valuable consideration for his acceptance of the bill, viz. the forbearance of *James Peto* to make any claim in opposition to his taking possession of the goods.

For the purpose of this case we may treat the bill as drawn and indorsed by a fictitious person, and accepted by the defendant for a valuable consideration, with a full knowledge of all the facts. The defendant has had all the benefit arising from possession of the goods; and, not having paid the bill, and an action being

brought, he pleads that the bill was not indorsed by *John Peto*, and that he is not liable as acceptor. No doubt, as a matter of fact, the bill was not indorsed by *John Peto*; but the question is, whether the defendant can be now admitted to gainsay what was done by arrangement between him and *James Peto*, he well knowing all the circumstances under which the bill was drawn. It is said that there is an estoppel in pais against the defendant disputing what he agreed should be taken as facts, when he accepted the bill; and that, after having authorized the drawing and indorsing the bill in the form in which it was drawn and indorsed, he cannot be admitted to say that the bill was not drawn and indorsed as it purports to be. *Primâ facie*, the acceptor is not admitted to deny the handwriting of the drawer; and I think the same rule applies to an indorsement by the drawer, the indorsement being on the bill when it was accepted. It may be that he would not be bound to admit the handwriting of a person who was a stranger; but here the indorsement is in the same handwriting as the drawing.

The general definition of estoppel is given in *Les Termes de la Ley*, tit. *Estoppel*:—"Estoppel is, when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth." This is what the defendant attempted to do. There is a distinction between estoppel by matter of record or deed and by matter in pais: in the latter case it arises on the evidence itself, and need not be pleaded; in the others it must be pleaded, if there be an opportunity. In *Sanderson v. Collman* (a) *Tindal* C. J. says:—"The first point in this case is, whether the drawee, after

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(a) 4 M. & G. 209. 218.

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accepting and thereby giving an apparent validity to a bill, has a right, in an action against him as acceptor, to set up as a defence that the name of the drawer was forged, or other matter invalidating the bill. And it appears to me that he has no such right." In this dictum *Tindal* C. J. does not speak of an objection to the acceptor setting up as a defence any incapacity of the drawer as a ground of estoppel properly so called; but he says the acceptor has not the right to set up that defence. There are cases in which it has been held that estoppel by deed or matter of record must be pleaded; but there are as many cases which shew that it is competent to a party to take advantage of an estoppel in pais without pleading it; 1 *Wms. Saund.* 325 a, note (d), 6th ed. There are also cases which shew that, after a person has, by his own act, warranted that what appears on the face of a bill is perfectly regular, and has received value for it (because my judgment in the present case is founded on the assumption that the defendant did receive value for his acceptance of the bill, which the jury have in effect found),—after he has agreed with the person from whom he received value, and who is the holder of the bill, that the bill should be drawn and indorsed in the names which appear on it, he is not permitted to shew that those names are false or fictitious, and to set up what would be a fraud upon the party who has given value for the acceptance. If no value was given, or if the acceptor was ignorant of the circumstances, or was no party to the agreement by which the bill was drawn in a particular form, that might make a difference.

Then, it was said that the bill ought to have been declared on, as a bill payable to bearer; but the question

is, not how it ought to have been declared upon, but whether upon the doctrine of estoppel in pais the defendant, having accepted the bill under the circumstances here found, is entitled to take such an objection. On the whole, it seems to me, upon the authorities as well as upon principle, that he is not. The cases go to this extent, that the defendant, is precluded by his own act from saying that the person whose name appears on the bill as drawer is fictitious or was dead at the time; and I think he is equally precluded from taking the objection that the declaration states the bill to have been drawn and indorsed in the name of an existing person, though he was at the time dead; and therefore the plaintiff was not bound to treat the bill as a bill payable to bearer, though he might possibly recover if he did so.

I am therefore of opinion that the plaintiff is entitled to have the verdict entered for him on the traverse of the indorsement, and that all the other pleadings should be struck out. But, as the same question might be raised on those pleadings, the defendant has leave to appeal.

CROMPTON J. I am entirely of the same opinion, and do not wish to add to the reasons given for our judgment by my brother *Wightman*.

As to the pleadings, the question on which we give leave to appeal must be considered as open on the traverse of the indorsement; and the Court of error is to have the same power which this Court has to amend the pleadings.

I will only further observe that the question whether the defendant can be permitted to say that the bill,

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though purporting to be drawn and indorsed by *John Peto*, was not so in fact, is not so much in the nature of an estoppel where one person is misled by the fraud or deceit of another and induced to believe a certain state of facts, and to act upon it, whereupon the other is precluded from denying it, as in *Pickard v. Sears (a)*: it is rather as *Parke B.* puts it at the end of his judgment in *Freeman v. Cooke (b)*, when commenting on *Pickard v. Sears (a)*, a matter arising out of a contract between the parties, in which a particular state of facts is assumed to exist, and the party acting upon that assumption has had his position altered: he has then a right to consider that state of facts as existing, and the other party ought not to be permitted to deny it. I go a great way with the able argument of *Mr. Rochfort Clarke*, that the doctrine of estoppels in pais, which rests on fraud, or deceit, or ignorance of one of the parties, does not strictly apply to this case, in which both parties knew the real state of facts. But when two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it, and in this class of estoppels deceit, in which is involved the question whether the party knew the real state of facts, is not necessary.

A cause was tried before me, about ten years ago, on the Western Circuit, in which a father was sued upon his acceptance, forged by his son: the parties who held the bill had gone to the father and said, "We shall proceed against your son; is this your acceptance?" and the father then said, "It is." I thought that the

(a) 6 A. & E. 469.

(b) 2 Exch. 654. 664.

rule as to estoppel in *Freeman v. Cooke* (a) applied. A bill of exceptions was tendered to my ruling by a very learned person, but, after consideration, abandoned. I am not sure whether the parties had knowledge that it was not the acceptance of the father. But I think that the person who said, "This is my acceptance," and so induced the parties holding the bill to alter their situation, would have been equally bound by the statement, if they knew that it was not his acceptance: and although the parties might suspect that the son had forged it, yet the person making that statement must be considered as saying, "This instrument may be treated as if accepted by me."

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The present case is not one of the class of cases of estoppel by deed or record, but it is an estoppel by evidence. If it appears, on evidence, that two parties to a mercantile transaction, upon the negotiation of a bill, assume that a particular person was the drawer of it, or that, by express agreement between the parties, a bill was drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered, as in the present case, by giving up certain goods to the other, that other is not at liberty afterwards to say that the fact which was assumed as the basis of the contract or arrangement, and upon which the other party acted, and thereby altered his position, was really untrue, and that the bill is void.

MELLOR J. The doctrine applicable to the present case is a useful one, and ought not to be narrowed. At the trial, it being contended that it was open to the defendant to prove his plea, which traversed the in-

(a) 2 *Exch.* 654.

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dorsement of the bill by *John Peto*, I thought that, if the defendant got a valuable consideration for his acceptance, he was precluded from denying the indorsement: and I think it must be taken that he did get a valuable consideration; for it appears on the evidence that he, by the authority of *James Peto*, got possession of goods, amounting in value to the sum for which the bill was given; and by agreement, to which the defendant was party, *Collins*, who had been the clerk of *John Peto*, and must be taken to have been acting as such at the time, drew the bill and indorsed it in the name of *John Peto*, though deceased. That being the basis of the arrangement, it appeared to me that the case, though a peculiar one, was within the authority and principle of the cases cited by Mr. *Garth*; and I still think the verdict for the plaintiff right, although I am glad that the Court has seen its way to allow an appeal.

Ordered:—"Rule be discharged upon the terms hereinafter mentioned: that all the pleadings, except the pleas denying the indorsement of the bill and the accounts stated and the issues raised thereon, be struck out, without costs on either side, and the defendant have leave to appeal; that the Court of error shall have full power to make all amendments to determine the question as to the quasi estoppel in pais and the accounts stated. And it is further ordered that the defendant do bring 390*l*. into Court within twenty-one days; otherwise that he have no leave to appeal, and that the above mentioned rule be discharged absolutely."

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The QUEEN *against* RICHARD ROBERTS and
WILLIAM HENRY STONE, Esquires, Justices of
Surrey, and RICHARD MAY.

Friday,
January 30th.

Church rate.
Local Act.
Division of
parish.

Vestry meet-
ing.
Mode of taking
poll.
Amendment.

Stats. 53 G. 3, c. clxii. and 3 & 4 W. 4, c. xxxiii. contain provisions by which any rate in the parish of *C.*, made by virtue of either of the Acts, may be recovered by summons before two justices of the peace; and an appeal is given to the Quarter Sessions. Separate districts for ecclesiastical purposes were afterwards formed in *C.*, under stat. 19 & 20 Vict. c. 104. In 1861 the churchwardens of *C.* gave notice that a vestry of the parish, except those districts, would be held to make a rate for the repair of the parish church: and in the notice it was stated that a show of hands would be taken on each proposition or amendment which might be submitted to the meeting, and if a poll should be demanded, the polling would be taken at an adjourned meeting on all the propositions and amendments made at the original meeting. At the meeting a rate of 2*d.* in the pound was proposed, and an amendment was moved "that no rate be granted." The majority were in favour of the amendment. Upon a poll being demanded, the vestry was adjourned for the purpose of taking it. At the poll the voting was "for the motion" and "for the amendment;" and at the close of it the chairman declared the motion to be carried, and no other amendment was allowed to be put: Held,

1. That notwithstanding the creation of the separate districts, the local Acts still applied to church rates for the parish church of *C.*

2. That, the amendment being a direct negative of the original motion, it was not necessary to take the poll on each; and that no amendment could be brought forward after the close of the poll.

IN *Michaelmas* Term (Nov. 24th) *Lush* obtained a rule calling upon *Richard Roberts* and *William Henry Stone*, justices for the county of *Surrey*, and *Richard May*, to shew cause why the said justices should not issue their warrant to levy, by distress and sale of the goods and chattels of *Richard May*, the sum of 1*l.* 6*s.* 8*d.*, due by him on account of a church rate for the parish of *St. Giles Camberwell*, in that county, made on the 4th *July*, 1861.

It appeared from the affidavits in support of the rule that, on the 25th *June*, 1861, the churchwardens of the parish of *St. Giles, Camberwell*, gave notice of an open

the above mentioned districts, was thereupon demanded, and the vestry was then adjourned until the 8th *July*, at 8 o'clock in the morning. No other motion or amendment was proposed to the vestry, or offered or mentioned to the chairman. On the 8th *July*, the adjourned vestry was duly held, in order to take a poll of the parish for the motion and the amendment. The poll was opened at 8 o'clock in the morning of the 8th *July*, and was kept open until 8 o'clock in the evening; and, shortly after its close, the chairman declared the numbers to be as follows; for the amendment, 873, for the motion, 981, majority for the motion, 108; and thereupon also declared the motion to be carried. The rate was made, and duly confirmed in pursuance of the statute by the Surrogate, upon the inhabitants, occupiers and holders of lands, grounds and other hereditaments and premises, except the districts above mentioned. In this rate *Richard May* was rated in the sum of 1*l*. 6*s*. 8*d*. Upon a demand and refusal to pay, he was summoned and appeared before two justices on the 15th *February*, 1862, who determined to issue their warrant of distress for levying the rate. They refused to state a case under stat. 20 & 21 *Vict. c.* 43., on the ground that that statute did not apply, and that the applicant must appeal to the Quarter Sessions, under sect. 51 of stat. 53 *G. 3. c.* clxii., but decided that the warrant should not issue until the applicant had had an opportunity of applying to this Court for a rule calling upon the justices to state a case. That application was made and refused in *E. T.*, 1862 (see *Ex parte May*, 2 *B. & S.* 426). Afterwards inquiry was made whether the rate would be paid, so as to avoid the necessity of the warrant being executed, and the answer was that, if the

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warrant was put in force, an action of trespass would be brought. In consequence of that threat, the justices resolved to withdraw their warrant.

The affidavits in opposition to the rule stated that, at the meeting on the 4th *July*, 1861, a division was called for, and that the chairman said to the meeting, "Those in favour of the amendment go to the right, and those against it, go to the left;" and he then declared the result as being 192 for the amendment, and 98 against it; that, on both occasions, he spoke of voters voting for and against the amendment; and did not at any time ask the meeting if there were any other amendments to be put, or in any way announce that it would be late to move them after the close of the poll; that, at the poll on the 8th *July*, a parishioner protested to the churchwarden who presided that the mode of taking the votes for the amendment and for the rate, instead of for and against the amendment, was illegal; that he went to the polling place prepared to move a further amendment on the result of the poll being announced and attempted to do so, but was unable, in consequence of the chairman immediately quitting the chair and the room the moment he had announced the numbers; and that several other persons were prepared to move amendments, or to support them, but were prevented in the same way.

The parish of *St. Giles, Camberwell*, is governed by two local Acts: 53 *G. 3. c. clxii.*, "An Act for better assessing and collecting the poor and other rates in the parish of *St. Giles, Camberwell*, in the county of *Surrey*, and regulating the affairs thereof;" &c., and 3 & 4 *W. 4. c. xxxiii.*, for altering and amending that Act.

Sect. 3 of the former Act, "for the better and more

effectual raising and levying the rates or assessments for the maintenance and relief of the poor, and all other rates and assessments made by the churchwardens and overseers of the poor, or vestry of the said parish, or which are mentioned in or authorized and directed by this Act," contains provisions by which "any rate or assessment made, laid, and assessed by virtue or under the powers" of the Act may be recovered by summons before one or more justice or justices of the peace, who were authorized and required upon non-payment to grant a warrant to levy the same by distress and sale of the goods and chattels of the party.

Sect. 11 of the latter Act enacts, that if any person rated to any rate made by virtue of either of the Acts shall neglect or refuse to pay the same, he may be summoned before two justices, who are authorized and required to grant a warrant to levy the rate by distress and sale of the goods and chattels of the person so neglecting or refusing.

Sect. 51 of the former Act gives a right of appeal to the Quarter Sessions to any person aggrieved by any rate or assessment, or by any order, judgment or determination of any justice or justices of the peace acting in execution of the Act, or by any matter or thing done in pursuance thereof.

Mellish and C. J. Foster shewed cause.—First. The justices have no jurisdiction under the local Acts to issue their warrant to enforce payment of this church rate, which was made for part only of the parish of *St. Giles, Camberwell*. The provisions of the local Acts, which were passed before the portions of the parish excepted from the church rate were formed into eccle-

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siastical parishes or districts under the Marquis of Blandford's Act, 19 & 20 Vict. c. 104., relate to rates made by the churchwardens and overseers or vestry of *St. Giles, Camberwell*, for the whole parish.

Secondly. The poll ought to have been taken both upon the original motion and upon the amendment: there may have been parishioners who were opposed to both, and would have been in favour of a rate of less than 2*d.* in the pound. [*Blackburn J.* No amendment to that effect was suggested at the time when the poll was agreed upon. *Cockburn C. J.* Nor before the poll was any amendment proposed in case the first amendment should be negatived.] After the poll had been taken on the amendment, the original motion ought to have been put and carried or rejected simpliciter. In *Elt v. The Burial Board for St. Mary, Islington (a)*, a proposal that a Burial Board, appointed under stat. 15 & 16 Vict. c. 85., should be authorized to borrow a sum of money, was not put to the vote by a show of hands, but was met by an amendment that the matter should be referred back to the Board to be reconsidered, and, a show of hands being taken upon this amendment, it was carried by a majority; but upon poll, the votes being taken affirmatively, for the original motion and the amendment, there was a majority for the original motion. On these facts, Sir *W. P. Wood V.* held that the manner of taking the poll on the resolution and amendment was informal, because the majority of votes being given for the original proposition did not prove that it was preferred to every other proposition, but merely to that particular one which had been put as an amendment, which was not a direct negative of it. In the present case, the amendment being a direct

(a) *Kay*, 449.

negative of the original motion, affirmative and negative votes might have been taken upon each. [*Blackburn J.* If this rate is within the local Acts, this objection would be ground of appeal under sect. 51 of the first Act, as we held in *Ex parte May (a)*.] It is doubtful whether the Legislature intended the right of appeal given by sect. 51 of stat. 53 G. 3. c. clxii. to apply to a church rate, and so oust the jurisdiction of the ecclesiastical Court. Stat. 53 G. 3. c. 127. s. 7. gives power to justices to enforce payment of church rate if the amount does not exceed 10*l.* The notice of the meeting for a church rate states that if a poll be demanded it will be taken "on each proposition or amendment" made at the meeting, which means that there will be affirmative and negative voting on each proposition, and affirmative and negative voting on each amendment. If this is a case of doubt, the Court will not order the justices to grant their warrant.

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Lush, contra. First. There is nothing in stat. 19 & 20 Vict. c. 104. to affect the liabilities of parishioners which are regulated by any local Act.

Secondly. The only practical mode of dealing with questions in parish meetings has been followed in the present case. There was an invitation that all amendments should be proposed at the meeting for making a church rate, and at that meeting there was no suggestion that, if any rate was granted, 2*d.* in the pound was not the proper amount. This question was decided in *Rex v. The Vicar and Churchwardens of Hammersmith (b)*. In *Ell v. The Burial Board for St. Mary, Islington (c)*,

(a) 2 B. & S. 426.

(b) 16 Just. of the Peace, 632, nom. *Ex parte Stevens, In re the Vestry of the Parish of Hammersmith*. Reported post p. 504, note (a).

(c) *Kay*, 449.

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COCKBURN C. J. The doubt in my mind has been whether the parties on whose behalf this application is made should not be put to apply for a *mandamus*, but I am now satisfied that the matter is sufficiently clear to enable us to make this rule absolute.

The first question is, whether, portions of the parish of *St. Giles, Camberwell*, having been separated from it and formed into separate parishes for ecclesiastical purposes under stat. 19 & 20 *Vict. c. 104.*, the local Acts regulating the concerns of the parish still remain in force with regard to the main body. If, where a portion of a parish is taken away from it for ecclesiastical or other purposes, all the provisions of the previously existing Acts, whether general or local, cease to apply to it, it would be left without any law to regulate its affairs. That could not have been intended by the Legislature.

The second question relates to the mode in which the sense of the parish was taken on the question of a church rate. If we could see our way to the conclusion that there was any objection to the mode in which the sense of the parish was taken—that it was taken in such a manner as to prevent an intermediate question being raised—the mode adopted could not have been upheld; but this was clearly an afterthought when the parties were before the justices. A proposition was made to the vestry meeting for a church rate of *2d.* in the pound, certain parishioners objected to any church rate being made, and sought to defeat it: in such a case there is no occasion to propose an amendment, the

proposition may be met by a direct negative of the original motion ; and the amendment which was moved was neither more nor less than such a direct negative. No intermediate proposition was submitted, for instance, that the rate should be of less than 2*d.* in the pound. The meeting was adjourned for the simple purpose of taking the poll on the original motion and the amendment, there being nothing else before the meeting : the sense of the parish was taken, and the majority was in favour of affirming the rate. No objection was taken at the commencement of the poll ; though, if it had been, I doubt whether it would not have been then too late. According to the general practice, all the propositions should be submitted to the parishioners before they go to the poll ; and it would be highly inconvenient if, in the case of a large body of persons, such as the rated inhabitants of a parish, after the polling had taken place upon the propositions before the meeting, any person might propose a fresh amendment, and another poll should be taken upon that, and so on ad infinitum : the business of the parish could not practically be carried on. Even if there were a substantial objection to the rate, and it had been submitted to the parishioners before the poll was taken, the rate having been made, I doubt if it would not be a rate *de facto*, which any parishioner who thought fit to do so could only question by appeal. The justices were bound to issue their warrant, as we have held in more than one case, since supported in the Exchequer Chamber, and in the case of this very rate, *Ex parte May* (a).

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WIGHTMAN J. The only point on which I have felt any doubt has been as to the mode of taking the poll. But

(a) 2 B. & S. 426.

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the whole course of proceeding shews that the only other question made at the meeting was whether there should be any rate at all: it was not then, nor until after the poll was declared, suggested that there was any intermediate question as to the amount of the rate. If, after that, a new proposition might be brought forward, it would come to this, that amendment after amendment might be moved ad infinitum, as the Lord Chief Justice has suggested, and no rate could ever be made.

CROMPTON J. I entirely agree, and particularly with the terms in which the Lord Chief Justice has stated the proper mode of taking the poll, which we approved eleven years ago in *Reg. v. The Vicar and Churchwardens of Hammersmith (a)*.

BLACKBURN J. concurred.

Rule absolute.

(a) A report of this case is subjoined, in the compilation of which the reporters have had the assistance of *D. Keane, Esq.*

[Saturday,
June 12th,
1852.]

Vestry meeting.
Amendment.
Mode of putting question.
Scrutiny.

The QUEEN against The Vicar and Churchwardens of HAMMERSMITH.

THIS was a rule calling upon the vicar and churchwardens of the parish of Hammersmith, in the county of Middlesex, to shew cause why a mandamus should not issue commanding them to summon a vestry for the purpose of determining the application of a sum of money which had been paid by *The Great Western Railway Company* in compensation for the extinguishment of commonable rights of the inhabitants of Hammersmith over part of a common called *Wormwood Scrubs* in that parish, which had been taken by the Company in execution of the powers of their special Act, 5 & 6 W. 4. c. cvii. By sect. 17 of that Act, in all cases in which common or waste land charged with or subject to any right of common is taken in execution of the powers of the Act, the compensation to be paid for the extinguishment of any right of common is to be received and applied for such general public purposes within the parish as a vestry thereof shall direct.

At a vestry meeting duly summoned to consider and determine the purpose to which this money should be applied, a proposition was moved and seconded that it should be applied partly to a district church, and

partly to almshouses. Thereupon an amendment was moved and seconded that the money should be applied to almshouses only. The vicar, who was in the chair, before putting to the vote either the original motion or the amendment, asked whether any other parishioner wished to address the meeting; and having waited some time, and not receiving an answer, he put the amendment, which on a show of hands he declared to be carried. A poll was then demanded and granted. At the polling, the vicar, as chairman, attended, and called upon the parishioners to vote for the district church and almshouses, or for the almshouses only. The result of the poll was in favour of the original motion. A scrutiny was then demanded, which the chairman refused, and declared that the original motion was carried and that the vestry meeting was at an end. Another amendment was proposed, that the money be applied to baths and washhouses, but the chairman refused to put it, on the ground that the vestry meeting was at end, and that this amendment should have been proposed at the first meeting.

C. Clark and Hance shewed cause.

Keane, Pashley and Lush, contra.—First. The two propositions involved in the original motion and the amendment were improperly mixed up together. Secondly. No opportunity was afforded for taking the sense of the parish as to the proposition for applying the money to baths and washhouses. Thirdly. The parties dissatisfied with the result of the polling were entitled to a scrutiny. In *Faulkner v. Elger* (4 B. & C. 449) it was the inclination of the opinion of the Court that, where the election of a perpetual curate was in the parishioners, it was illegal to take the votes by ballot, because that mode of taking them prevented a scrutiny. And in *Edenborough v. The Archbishop of Canterbury* (2 Russ. 93, 108, 109), Lord Eldon, for the same reason, held the election of a vicar by parishioners by ballot void, at least in general. [*Coleridge J. Who are to be the scrutineers?*] The parishioners would be entitled to elect scrutineers. [Lord Campbell C. J. Before the Reform Act, 2 & 3 W. 4. c. 45., which by sect. 58 prohibited a scrutiny by or before the returning officer, he granted one in his discretion: he was not bound to do so.]

Lord CAMPBELL C. J. The vicar appears to me to have acted with perfect propriety in receiving and putting propositions to the meeting, and to have given the parishioners an ample opportunity for expressing their sense as to the application of the fund in question. He did not, as the Speaker of the House of Commons would have done, state the original motion and the amendment, and then put the question "that the words proposed to be left out," (that is, so much of the original motion as was inconsistent with the amendment), "do stand part of the question," a mode of proceeding which probably would not have been very intelligible

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to the majority of the parishioners. But, from the way in which he put the propositions, those present at the meeting must have clearly understood what they were to decide; and that by the motion was meant "district church and almshouses," and by the amendment "almshouses" only. Then he afforded an opportunity of making any other proposition, but none was made; and I think he was entitled to conclude, as the fact appears to have been, that the parishioners had agreed that the fund should be applied to one of the two purposes expressed by the motion and the amendment; and that the only question to be submitted to the decision of the parishioners was, which of those propositions should be preferred. After the result of the poll was made known, the business of the vestry was over; and when the vicar, on being called on to put a third proposition to the parishioners, replied that the vestry meeting was at an end, he acted legally and discreetly.

As to the right of any voter to insist on a scrutiny in respect of every proposition submitted to the determination of a parish vestry, the only authorities cited were *Faulkner v. Elger* (2 B. & C. 449), and *Edenborough v. The Archbishop of Canterbury* (2 Russ. 93), in which it was said that taking the votes by ballot was bad, because that mode of voting prevented a scrutiny. A scrutiny is a further inquiry for the purpose of ascertaining whether the persons admitted to vote had a right to vote or not. And in some cases the votes must be so taken that the Court or other authority which has to decide on the validity of the proceedings may be able to institute that further inquiry. In *Reg. v. Avery* (18 Q. B. 576), an inquiry into the validity of the voting papers at an election of borough councillors under stat. 5 & 6 W. 4. c. 76., took place ~~at~~ nisi prius, and afterwards, on certain questions of law, in this Court; and ~~if~~ if the votes had been taken by ballot, that scrutiny could not have ~~been~~ had. And in the meetings of parish vestries, there may be circumstances in which justice would require that a scrutiny should take place, ~~and~~ when that is made out, the voter may have a right to demand a scrutiny. But there is no authority which recognises the right to a scrutiny in every case in proceedings at a vestry.

COLERIDGE J. The sense of the parishioners upon the question ~~submitted~~ submitted to them must be fairly taken: and that I think was done by ~~the~~ mode in which the vicar put the motion and the amendment.

ERLE J. The proceedings of vestry meetings on such occasions ~~as~~ as these are not governed by strict formalities. It is sufficient if the ~~sense~~ sense of the parishioners as to the application of the money was fairly ~~taken~~ taken, as I think it was in the present case; and the affidavits shew that ~~the~~ their intention has been carried out.

CROMPTON J. concurred.

Rule discharged, with costs.

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The Clerk of the Peace for the County of *Wednesday, January 21st.*
 SOMERSET, appellant, The Overseers of the
 Poor of the Parish of SHIPHAM, respondents. *Pauper lunatic. Maintenance. Scotch husband.*

A *Scotchman*, who had no settlement in *England*, married an *English-woman*. While they resided together in an *English* parish, she was sent as a lunatic pauper to a lunatic asylum by order of a justice of the peace, under stat. 16 & 17 *Vict. c. 97*. Held that, notwithstanding the provisions of stat. 8 & 9 *Vict. c. 117*, relative to the removal of *Scotch* paupers and their families to their own country, the expenses of her removal to the asylum and her maintenance there should be charged to the county, and not to the parish where the husband and wife resided (a). *16 & 17 Vict. c. 97. 8 & 9 Vict. c. 117.*

CASE stated by justices of the peace, under 20 & 21
Vict. c. 43.

At a Petty Sessions holden for the division of *Ax-bridge*, in the county of *Somerset*, a complaint of the overseers of the parish of *Shiphham*, in that county, against the clerk of the peace for the same, under 16 & 17 *Vict. c. 97. s. 98*., charging that, on the 9th October, 1861, *Martha Ray*, the wife of *Thomas Ray*, a *Scotchman* born, who had not acquired any settlement in *England*, and with whom she was then residing in the respondents' parish, became lunatic, and was sent, by order of a magistrate, to the county lunatic asylum, at *Wells*, in that county, as a lunatic pauper, at the charge of the respondents' parish, being the parish in which the lunatic was found, and that such lunatic pauper was properly chargeable to the appellant's county, was heard and determined, and the pauper lunatic was ad-

(a) See now stats. 24 & 25 *Vict. c. 76*. and 26 & 27 *Vict. c. 80*.

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The lunatic pauper was residing with her husband in the respondents' parish at the time she was found a lunatic, and was sent, by the order of a magistrate, to the county lunatic asylum, at *Wells*, in the said county, at the charge of the respondents' parish, and a cost of 4*l.* 7*s.* 4*d.* had been incurred by the said last mentioned parish in the apprehension and removal of her to the asylum, and her maintenance therein. *Thomas Ray* was born in *Scotland*. His father and mother were both dead. They died in *Scotland*, and had never lived out of *Scotland* within *Thomas Ray's* recollection. He left his father and mother, and enlisted as a soldier, when about eighteen years of age, and had never gained a settlement in his own right. In *November*, 1849, he married his said wife *Martha*, then *Martha Macbride*, at the parish church of *Newton Nottege*, in the county of *Glamorgan*.

Upon the above facts it was contended, on behalf of the appellant, that the justices were not authorized to make an order adjudicating the pauper to be chargeable to the appellant's county, and directing the county treasurer to pay the expenses incurred, and the costs of and attending the hearing of the complaint, and the adjudication thereon, under the 98th section of stat. 16 & 17 *Vict. c. 97.*, inasmuch as that section extended only to cases where the settlement of the pauper lunatic could not be ascertained; whereas it was ascertained by the evidence before the justices that the pauper was born and settled in *Scotland*, to which place he and his wife and family were removable in pursuance of stat.

8 & 9 *Vict. c. 117. s. 2.*, and therefore the 98th section of the first mentioned statute did not apply to such a case.

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The justices, however, were of opinion that it was the intention of the Legislature to relieve individual parishes from the burthen of the maintenance of all pauper lunatics, whether *Scotch* born or otherwise, not having any legal settlement in the parishes respectively where found, or any ascertainable legal place of settlement elsewhere in *England* or *Wales*, and to transfer the charge of maintenance to their respective counties. That the 98th section of the statute above referred to, taken in connection with the 97th section of the same statute, was intended to comprise all cases not provided for by the last mentioned section. And that the expression in the 98th section, when "it cannot be ascertained in what parish such pauper lunatic is settled," includes a case in which it is ascertained that the pauper has no settlement in any parish in *England* or *Wales* (to which portions alone of the *United Kingdom* the statute is declared to apply).

They therefore adjudged the pauper lunatic to be chargeable to the appellant's county, and made an order upon the county treasurer for payment of the sum of 4*l.* 7*s.* 4*d.*, being the amount of the expenses incurred, together with the sum of 1*l.* 7*s.* 6*d.*, being the costs of and attending the hearing of the complaint and the adjudication thereon.

The question for the opinion of the Court was, whether or not the case of this pauper was within the 98th section of stat. 16 & 17 *Vict. c. 97.*, and she was properly adjudged to be chargeable to the appellant's

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county. If properly so adjudged, then the order to be confirmed ; but if otherwise, then the order to be quashed.

This case depended on the construction of the following sections of stats. 16 & 17 *Vict. c. 97.* and 8 & 9 *Vict. c. 117.*

16 & 17 *Vict. c. 97. s. 67.* empowers justices of the peace to make orders for sending pauper lunatics to lunatic asylums on the application of the officers of the parish where they are resident, and, by sect. 68, similar powers are given to them when the lunatic is found wandering &c.

Sect. 95. "When any pauper lunatic is confined under the provisions of this Act he shall, for the purposes of this Act, be chargeable to the parish from which, at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled ; and every pauper lunatic who is chargeable to any parish shall, whilst he resides in an asylum, registered hospital, or licensed house, be deemed for the purposes of his settlement to be residing in the parish to which he is chargeable."

Sect. 96. The justices of the peace are empowered to make orders upon the officers of unions and parishes for the maintenance of lunatics confined in an asylum.

Sect. 97. Two justices may inquire into and adjudge the settlement of a lunatic confined in an asylum, and order payment of the expenses of examination of such lunatic and bringing him before them, and his conveyance to the asylum, and maintenance &c. there.

Sect. 98. "If any pauper lunatic be not settled in the parish by which &c. he is sent to any asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled, and if a relieving officer of such first mentioned parish, or of the union in which the same is situate, or the overseers of such first mentioned parish, shall give ten days' notice to the clerk of the peace of the county in which such lunatic was found to appear for such county before two justices thereof, at a time and place to be appointed in such notice, it shall be lawful for such two justices, or any two or more justices of such county, upon the appearance of such clerk of the peace, or any one on his behalf, or, in case of his non-appearance, upon proof of his having been served with such notice, to inquire into the circumstances of the case, and to adjudge such pauper lunatic to be chargeable to such county, and to order the treasurer of such county to pay to the guardians of any union or parish or the overseers of any parish all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and the bringing him before a justice or justices, and his conveyance to the asylum, hospital, or house, and all monies paid by such guardians or overseers to the treasurer, officer, or proprietor of the asylum, hospital, or house, for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and (if such lunatic is still in confinement) also to pay to the treasurer, &c., the reasonable charges of the future lodging, &c. of such lunatic; &c.: Provided always, that such justices may direct such inquiry to be made to ascertain the parish in which any pauper lunatic is settled as they

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Sect. 95. "When any pauper lunatic is confined under the provisions of this Act he shall, for the purposes of this Act, be chargeable to the parish from which, at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled ; and every pauper lunatic who is chargeable to any parish shall, whilst he resides in an asylum, registered hospital, or licensed house, be deemed for the purposes of his settlement to be residing in the parish to which he is chargeable."

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Sect. 98. "If any pauper lunatic be not settled in the parish by which &c. he is sent to any asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled, and if a relieving officer of such first mentioned parish, or of the union in which the same is situate, or the overseers of such first mentioned parish, shall give ten days' notice to the clerk of the peace of the county in which such lunatic was found to appear for such county before two justices thereof, at a time and place to be appointed in such notice, it shall be lawful for such two justices, or any two or more justices of such county, upon the appearance of such clerk of the peace, or any one on his behalf, or, in case of his non-appearance, upon proof of his having been served with such notice, to inquire into the circumstances of the case, and to adjudge such pauper lunatic to be chargeable to such county, and to order the treasurer of such county to pay to the guardians of any union or parish or the overseers of any parish all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and the bringing him before a justice or justices, and his conveyance to the asylum, hospital, or house, and all monies paid by such guardians or overseers to the treasurer, officer, or proprietor of the asylum, hospital, or house, for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and (if such lunatic is still in confinement) also to pay to the treasurer, &c., the reasonable charges of the future lodging, &c. of such lunatic; &c.: Provided always, that such justices may direct such inquiry to be made to ascertain the parish in which any pauper lunatic is settled as they

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think fit, and delay adjudging such pauper lunatic to be chargeable to any county until such further inquiry has been made: Provided also, that every county to which any pauper lunatic is adjudged to be chargeable as aforesaid may at any time thereafter inquire as to the parish in which such lunatic is settled, and may procure such lunatic to be adjudged to be settled in any parish."

Sect. 104. If it appears that the lunatic has property applicable to his maintenance, and more than sufficient to maintain his family, if any, the justices may render it available for his maintenance.

Sect. 135. The Act shall extend only to *England* and *Wales*.

Stat. 8 & 9 *Vict. c. 117.*, to amend the laws relating to the removal of *Scotch, Irish, &c. poor*.

Sect. 2. "If any person born in *Scotland* or *Ireland*, or in *The Isle of Man*, or *Scilly*, or *Jersey*, or *Guernsey*, not settled in *England*, become chargeable to any parish in *England* by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child, such person, his wife, and any child so chargeable, shall be liable to be removed respectively to *Scotland, Ireland, The Isle of Man, Scilly, Jersey* or *Guernsey*; and if the guardians of such parish, or of any union in which the same may be comprised, or, where there are no such guardians, if the overseers of such parish, complain thereof to any one justice of the peace, such justice may, if such person do not attend voluntarily, summon him to come before any two justices of the peace, at any time and place to be named in the summons; and at such time and place, or on the attendance of such person, any two justices may hear and examine into the matter of such complaint, and if it be made to appear

to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant under their hands and seals to remove such person forthwith at the expense of such union or parish."

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By sect. 7, The Poor Law Amendment Act, 4 & 5 W. 4. c. 76., and all Acts to amend and extend the same, and the present Act, except so far as the provisions of any former Act are altered, amended, or repealed by any subsequent Act, shall be construed as one Act.

The case was argued on *January* 17th and *January* 21st, and judgment was delivered on the latter day.

Welsby, for the respondents.—The Lunatic Asylums Act, 1853, stat. 16 & 17 Vict. c. 97., for the removal of pauper lunatics to asylums &c. applies to all *English* paupers, and when such paupers are sent to an asylum, justices of the peace are to make orders for their maintenance while there. When a pauper's place of settlement can be ascertained the order for maintenance must be made on that place, otherwise it must be made on the county. The 8 & 9 Vict. c. 117., and other Acts for the removal of *Scotch*, *Irish*, &c. paupers to their own country, relate only to paupers who become chargeable in *England* in the ordinary way, and have no application to expenses incurred by parishes with respect to pauper lunatics.

Kinglake Serjt. (*Poulden* with him), for the appellant.—Stat. 16 & 17 Vict. c. 97. applies solely to *English* paupers, and does not interfere in any way with the provisions of stat. 8 & 9 Vict. c. 117., which provides for the removal of *Scotch*, *Irish*, &c. paupers to their own country,

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and is, in substance, a renewal of several former Acts on that subject. It would be a grievance if *English* counties were burdened with the expense of the lunatic members of a family whose head, being *Scotch* or *Irish*, has no settlement in *England*, and ought, with his family, to be removed to his own county under the latter statute. [*Wightman J.* Suppose the husband had an *English* settlement, and had become chargeable, on account of his wife, as he has become here, could they both be removed to his place of settlement?] Yes. [*Crompton J.* It would be a strong measure to remove the *husband*. As to paupers, any person relieved by the parish, though it be but once, and even if a foreigner, is a pauper.] In *Rex v. The Inhabitants of Leeds* (a), it was held, under 59 G. 3. c. 12., the statute then in force on the subject of the removal of *Scotch* and *Irish* paupers, that the wife and unemancipated children of a *Scotchman* who had not acquired any settlement in *England* must, if chargeable, be sent with a pass along with the husband to *Scotland*, and could not be removed to the maiden settlement of the wife; and *Bayley J.* there says, p. 501: "It is against public policy and good morals, to permit the separation of husband and wife, even with their consent." In *Reg. v. The Inhabitants of Mile End Old Town* (b) where a female pauper, born in *England* of *Irish* parents without settlement, and who had not herself gained a settlement, became chargeable to a parish in *England* while she resided with her father as part of his family, it was held that she was removeable to *Ireland*, as stat. 4 & 5 W. 4. c. 76. was inapplicable. Stat. 8 & 9 Vict. c. 117. s. 7. — incorporates that statute with itself in order to get rid of the effect of that decision. In *Reg. v. The Inhabitants* —

(a) 4 B. & A. 498.

(b) 4 A. & E. 196.

of *Great Clacton* (a) a child of *Irish* parents without settlement, whose mother afterwards married a person who had a settlement, was held removeable to the place of its birth, as the case did not come within stat. 59 G. 3. c. 12. In *Reg. v. The Inhabitants of All Saints, Derby* (b), decided under stat. 8 & 9 Vict. c. 117., where children, under the age of sixteen years, born in *England* of *Irish* parents, having been deserted by their father, and their mother having died, became chargeable, they were held removeable to the parish of their birth. [He also cited *Reg. v. The Inhabitants of St. Giles without Cripplegate* (c) and *Reg. v. The Inhabitants of Barnsley* (d).] In *Reg. v. The Clerk of the Peace for Middlesex* (e) Coleridge J. says, p. 537 :—"An *Englishman* must have some settlement, though the precise settlement may not be known. An *Irishman* or a *Scotchman* has his country for a settlement, for he is removeable thither. A *Frenchman* or *Italian* may have no settlement." In *Reg. v. The Inhabitants of New Church* (f), where the child of an *Irishman* and his wife an *Englishwoman*, neither of whom had a settlement, was removed, under stat. 16 & 17 Vict. c. 97., to an asylum as a pauper lunatic, being then unemancipated and living with his parents, it was held that the order for his maintenance should be on the parish of his birth, and not on the county.

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Welsby was not called on to reply.

WIGHTMAN J. The wife of a pauper, born in *Scotland*,

(a) 3 B. & A. 410.

(b) 14 Q. B. 207.

(c) 17 Q. B. 636.

(d) 12 Q. B. 193.

(e) 16 Just. Peace, 536.

(f) 3 B. & S. 107.

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became lunatic, and was, under stat. 16 & 17 *Vict. c. 97. s. 67.*, sent, in a manner apparently regular in point of form, to a lunatic asylum at the expense of the parish where she and her husband resided. The husband was no further chargeable to the parish than in respect of the expense of sending her to the asylum and keeping her there. Under these circumstances, by whom are those expenses to be defrayed? The justices thought that they should be a charge on the county, and the question is, were they right?

By several statutes, the most important of which is 8 & 9 *Vict. c. 117.*, paupers born in *Scotland*, having no settlement here, are to be removed to the country of their birth. Stat. 16 & 17 *Vict. c. 97.* applies to pauper lunatics in general, but this stat. 8 & 9 *Vict. c. 117.* is relied on as distinguishing the present case from those under its operation. There can be no doubt, and I understand my brother *Kinglake* to concede, that, if the settlement of the husband in *England* had been discovered, still the lunatic wife must have remained where she was. For obvious reasons, it is inexpedient that pauper lunatics should be sent about the country to seek a settlement, and this, perhaps, even to places where there are no lunatic asylums. I therefore assume that it was not the intention of the Legislature in stat. 16 & 17 *Vict. c. 97.* that a person regularly sent to an asylum in the first instance was to remain there with no provision as to who was to bear the expenses. It appears to me that this case is provided for by that statute. Sect. 67, under which the lunatic was sent to the asylum, is general in its terms: "Every medical officer of a parish or union who shall have knowledge that any pauper resident in such parish, or in any parish

within the district of such medical officer, is or is deemed to be a lunatic, and a proper person to be sent to an asylum, shall within three days after obtaining such knowledge give notice thereof in writing to a relieving officer of such parish, &c.," and shall then take certain steps. All that was regularly done in this case, without any inquiry, or necessity for inquiry, as to the place where the husband was settled. In the first instance it is sufficient if the poor person is a lunatic; he is to be sent to the asylum at the expense of the parish; and then arises the question of future expenses. That introduces the 95th section:—"When any pauper lunatic is confined under the provisions of this Act, he shall, for the purposes of this Act, be chargeable to the parish from which, or at the instance of some officer or officiating clergyman of which, he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled." Putting a reasonable construction on these words, it appears to me that this case comes within the latter part of the clause, for it cannot be ascertained where the pauper is settled in *England*, since ex concessis the husband is not settled there. Then comes sect. 98:—"If any pauper lunatic be not settled in the parish by which, &c., he is sent to any asylum, &c., and it cannot be ascertained in what parish such pauper lunatic is settled &c.," the pauper lunatic is not to be removed from the asylum, but is to remain there; and at whose expense? It appears to me, at the expense of the county.

The justices at petty Sessions were therefore right, and their order must be confirmed.

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CROMPTON J. This case seems to me to come within that put by Mr. *Welsby*,—where the place of settlement of the pauper cannot be ascertained. By sect. 95 of stat. 16 & 17 *Vict. c. 97.*, when a pauper lunatic (not having property, as provided for by a subsequent clause) is confined under the provisions of the Act, he shall, in the first instance, be chargeable to the parish from which he was sent. By sect. 97, the parish of his settlement is to be ascertained, and his expenses are to be charged to that parish; and by sect. 98, if that parish cannot be ascertained, they are to be charged to the county. My strong opinion is that these three sections were intended to apply to all cases of pauper lunatics; and that it cannot have been intended that in a third class of cases, to which perhaps my brother *Kinglake* would say the present belongs, these expenses should be imposed on the parish by which the lunatic was sent to the asylum. Certainly the expressions in these sections are not exactly correlative: the person drawing the statute thought it finer to vary the phraseology. It seems to me, however, that what the Legislature really mean is that, if the pauper is shewn to be settled in a parish, the expenses are to be charged to that parish (that is one alternative), and that, if it cannot be shewn that he is settled in any particular parish, they are to be charged to the county (that is the other alternative): but they have not used the fit words to express their meaning. I cannot think it was intended to leave all foreign lunatics on the parish where they are found. It is not a proper phrase to say that paupers are not to be sent to a lunatic asylum under this Act because they are not *English* paupers,—foreigners are treated as paupers for the purpose

being sent there. The pauper is, therefore, to be chargeable, in the first instance, to the parish in which he is found, and, if you cannot ascertain where his settlement is, and, by a liberal construction of the statute, that must include cases where he has not any settlement and therefore it cannot be ascertained, the expenses are to be charged on the county, which is better able to bear them than the parish. It is surely not necessary to send lunatics and lunatic wives abroad—out of the kingdom where the parties are foreigners—to *Scotland* or *Ireland*, where the parties are *Scotch* or *Irish*.

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MELLOR J. Unless my brother *Kinglake* shews that this pauper was improperly sent to the lunatic asylum, and that she and her husband ought to be removed to *Scotland*, his argument fails. But I think she was properly sent to the asylum. Stat. 8 & 9 *Vict. c. 117.* assumes that the paupers to whom it refers have become chargeable to a parish in *England*, and, by the interpretation clause (sect. 132) of 16 & 17 *Vict. c. 97.*, "pauper" is defined to mean "every person maintained wholly or in part by or chargeable to any parish, union, or county." It must therefore be taken that the lunatic was a pauper chargeable to this parish. She is, it is true, the wife of a *Scotchman*, but, when it appears that she was properly sent to the asylum, much difficulty is removed. For, although the words of this statute do not define its meaning so clearly as if the person drawing it had before his mind the *Scotch* and *Irish &c.* Poor Removal Acts, still the 95th section says the pauper shall be sent to the lunatic asylum, and paid for by the parish by which he was sent there,

1863. *unless and until* the place of his settlement can be ascertained, in which event the liability shifts to that place. Reading these sections together, this appears to me the sensible construction of the language of the Legislature.

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Order confirmed.

*Monday,
January 26th.*

ATTACK against BRAMWELL.

*Distress.
Trespass ab
initio.
Measure of
damages,*

A declaration alleged that the defendant broke and entered a dwelling house of the plaintiff, seized divers goods and chattels, carried them away, and converted them to his own use. Plea, not guilty by stat. 11 G. 2. c. 19. s. 21. The defendant, who was landlord to the plaintiff, from whom rent was due to him, had, in order to make a distress, entered on the plaintiff's premises by forcibly breaking in a window, and seized and sold his goods: held,

1. That this mode of entry on the premises being unlawful in itself rendered the defendant a trespasser ab initio.

2. That the plaintiff was entitled to recover the full value of the goods, and not that value minus the sum due for rent.

THE first count of the declaration alleged that the plaintiff held a messuage and premises as tenant to the defendant, and that the defendant made a distress in them, and sold the goods seized, no rent being due.

The second was for making a similar distress for a larger amount of rent than was due.

The third alleged that the defendant broke and entered a dwelling house of the plaintiff, and seized divers goods and chattels, and carried them away, and converted them to his own use.

The fourth was for selling the goods seized under the distress for less than the best price that could have been gotten for them.

Plea, Not guilty by stat. 11 G. 2. c. 19. s. 21.

Issue.

There was also a common count, on which nothing turned.

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On the trial, before *Blackburn J.*, at the *Middlesex* Sittings after *Michaelmas* Term, 1861, it appeared that the plaintiff held a house of the defendant, No. 3, *Hollingsworth Street, St. James's Road, Islington*, at a yearly rent of 24*l.* from *Lady Day*, 1857, payable quarterly. On the 24th *July*, 1860, a distress was made by the defendant's bailiff for rent due; who, for the purpose of making it, effected his entry on the premises by forcibly breaking in a window. The learned Judge directed the jury that the plaintiff was not entitled to recover the full value of the goods seized under colour of the distress, but only their value minus the sum due for rent. The jury found for the plaintiff, damages 1*s.*

Shee Serjt., in *Hilary* Term, 1862, on the part of the plaintiff, obtained a rule nisi for a new trial on the ground of misdirection.

H. James shewed cause.—The authorities are against the plaintiff's application. It is true that *Mayne on Damages*, 234, when speaking of the 11 *G. 2. c. 19. s. 19.* which enacts that distresses for rent justly due shall not be deemed unlawful for any subsequent irregularity or unlawful act by the party distraining, says, that it does not apply where the distress is void ab initio; "as, for instance, where no rent was due at all; or where the distress was effected by breaking open an outer door; or where the goods taken were not distrainable at all. In all these cases trespass or trover may be maintained, and the actual value of the things recovered." *Harvey v. Pocock* (a), is the authority cited for this, which

(a) 11 *M. & W.* 740.

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does not however bear it out, for that case only shews that where goods not distrainable are taken, and the distress is withdrawn on the tenant's paying the amount of the rent and costs, he cannot, in an action of trespass, without proof of further damage, recover the whole amount paid by him, but only the actual damage sustained by taking those particular goods. [*Cockburn C. J.* Look at the effect of your doctrine. A man wanting to make a distress for a large amount, breaks into his tenant's house, and carries off a great quantity of goods, for which he renders himself liable in trespass, but then, if the damages are to be nominal only, the wrong doer will have gained his point. *Crompton J.* referred to *Proudlove v. Twemlow (a)*.] There the verdict was taken on a count in trover. [*Crompton J.* Suppose a man distrains for rent the day before it is due, and sells the goods the next day, would you contend that the tenant could not recover their full value?] Before stat. 11 G. 2. c. 19. s. 19. the breaking a door or window to make a distress was an irregularity, and not a trespass ab initio. [*Crompton J.* referred to *Semayne's Case*, 5 Co. 93 a, where it is laid down "that the sheriff cannot break the defendant's house by force of a fieri facias, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good," and the note to that case in 1 *Smith's Lead. Cas.* p. 91, 5th ed.] A landlord making a distress is in a different position from an officer of the law. [*Blackburn J.* In *Nargett v. Nias (b)* it was held that trespass, as well as case, will lie for distraining tools of trade, though not in actual use, if there be other unprivileged goods on the premises

(a) 1 Cr. & M. 326.

(b) 1 E. & E. 439.

at the time sufficient to satisfy the distress.] Where goods ought not to have been taken at all, it is more than an irregularity, but here the question is as to the measure of damages in trespass. In *Chinery v. Viall* (a), where the vendee of sheep, bought on credit, left them, for his own convenience, in the custody of the vendor, who resold them, it was held that this was a conversion, and that the measure of damages was not the value of the sheep, but the loss sustained by the vendee in consequence of their non delivery to him. The plaintiff here has got a benefit from the defendant; for the plaintiff could not lawfully have removed the goods to prevent their being distrained; and the defendant is estopped from saying that the rent was not paid under the distress. [*Finlason*, amicus curiæ, referred to *Jones v. Sawkins*, 5 C. B. 142.] In trespass for a nuisance to the walls of a house, the defendant having pleaded that he was fined for the nuisance, at the plaintiff's court leet, and paid the fine, it was held that, although not being a common nuisance the fine was improper, still, having been paid, it was a bar to the action; *Bro. Abr. Trespass*, pl. 100, citing 12 H. 4. 8. pl. 15. [*Crompton J.* There can be no plea to damages.]

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Shee Serjt. and *Woollett*, in support of the rule.— In 2 *Wms. Saund.* 284 c, note 2, 6th ed., the law is laid down that “a landlord has no right to break open the outer door of a house or a window to make a distress, but, if the door is open and he enters, he may break open an inner door (b).” The defendant, having made an unlawful entry into the plaintiff's house,

(a) 5 H. 4 N. 288.

(b) See *Brown v. Glenn*, 16 Q. B. 254.

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was a trespasser *ab initio*, and should be treated throughout as a person making a distress without even an ostensible right to distrain, and liable for the full value of any goods he may have taken under it. *Mayne on Damages*, 230, speaking of illegal distress, says :—"The damages in suits of this nature depend greatly upon the form in which the action may be brought. Where the defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful, their entire value will be recoverable. When it is necessary to sue for consequential damage, the plaintiff can only obtain damages for the special injury he has suffered, which may be very slight, where he was really in fault, and liable to a seizure of his goods." He cites *Harvey v. Pocock* (a) and several other cases of distress void *ab initio*, and then says, p. 235, "Even where a party is, or becomes, a trespasser *ab initio*, as to part of the thing distrained on, this does not make the distress void as to the rest. Accordingly, where several barrels of beer were distrained for rent, and the distrainer drew beer out of one of them, Lord Holt held, that it made him a trespasser, *ab initio*, as to that one only ;" citing *Dod v. Monger* (b). In *Knight v. Egerton* (c), which was an action for selling, *without appraisement*, goods that had been distrained for rent, it was held that the measure of damages was the real value of the goods minus the rent due. But in *Keen v. Priest* (d), where sheep were seized and sold under a distress for rent, which was unlawful because there were other goods on the premises which might have been taken, in which case sheep are exempt from distress, it was held that the plaintiff was entitled

(a) 11 M. & W. 740.

(c) 7 Exch. 407.

(b) 6 Mod. 215.

(d) 4 H. & N. 236.

to recover the full value of the sheep seized. In *Martin v. Porter* (a), where the defendant, in working a coal mine, broke through the barrier and worked the coal under the adjoining land belonging to the plaintiff, and raised it for the purposes of sale, the plaintiff having brought trespass, it was held that the proper estimate of damage was the value of the coal so raised, without deducting the expenses of getting and raising it. In *Jones v. Gooday* (b), in trespass for cutting into the plaintiff's close and carrying away the soil, the proper measure of damage was held to be the value to the plaintiff of the land removed, not the expense of restoring it to its original condition. And in *Pritchard v. Long* (c), where, in trespass, the defendant broke the plaintiff's close, and carried away his goods, the plaintiff was held entitled to damage both for the trespass and value of the goods.

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COCKBURN C. J. This rule must be made absolute. The defendant having done that which made this distress altogether void, and his entry on the plaintiff's premises and seizure of his goods a trespass ab initio, the plaintiff is entitled in this action to recover the actual value of those goods, and the ruling of the Judge, in leaving to the jury to take into consideration the benefit which the plaintiff had received from the discharge, by seizure and sale of his goods, of his liability to the defendant for rent, was a misdirection. It must be taken that if a man, under colour of legal authority, as in case of a distress for rent, does that which makes him a trespasser ab initio, he is in the same position as a mere stranger who, without any legal authority whatever, breaks into

(a) 5 M. & W. 352.

(b) 8 M. & W. 146.

(c) 9 M. & W. 666.

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the house and seizes the goods of another. It would not lie in the mouth of such a stranger to say that he applied the goods for the benefit of the party bringing his action for trespass. So, here, the defendant has taken the plaintiff's goods, it may be under colour of legal authority, but in point of law he has taken them not under a distress but under a trespass, and it does not lie in his mouth to say that, by taking them and appropriating a portion of them in satisfaction of his rent, he has, pro tanto, done good to the plaintiff. The man whose premises are broken into, and whose goods have been seized, has a right to say, "Let me be put into the position in which I stood before your illegal act. I will not accept, at your hands, the benefit you say you have done me by it." That is, I think, although there is some difference in the authorities, the true theory of the law in such a case, and the principle on which we ought to administer it. The last case on the subject, *Keen v. Priest* (a), fully bears me out in this view. There the party distraining had seized sheep, there being other goods on the premises which might have been distrained, for, by law, when there are other goods on a tenant's premises, his sheep cannot be distrained; and it was contended on the equity of the matter, and fairly enough, that if sheep had not been taken other things would have been. But the Court of Exchequer thought that, as regarded the distress for the sheep, it was a matter altogether tortious, and that the measure of damages was the full value of the sheep.

CROMPTON J. I am of the same opinion. A landlord

(a) 4 H. & N. 236.

has, by law, the special privilege of paying himself his rent by seizing his tenant's goods ; and, where he takes that proceeding in a way not authorized, he becomes a trespasser from the beginning ; all the acts he does are trespasses ; he is a trespasser, not only in entering, but in seizing and disposing of the goods taken ; and the ordinary rule is that the injured party shall recover their full value. In *Chinery v. Viall* (a), indeed, my brother *Bramwell*, in delivering the judgment of the Court, p. 294-5, cited several cases from *Mayne on Damages* to shew that, in trover, it is not an absolute rule of law that the value of the goods is to be taken as the measure of damage ; but they do not apply here. In *Proudlove v. Twemlow* (b), where growing crops were seized under a distress for rent and sold for their full value before they were cut, and they were afterwards cut and carried away by the purchaser, the Court said the seizure was right ; and, though the plaintiff had a property in the corn, the defendant had a lien upon it for his rent, which was terminated by cutting it. So, in trover, where there is a conversion of goods subject to the defendant's lien, it is clear that all that can be recovered is their value minus the lien. But here the defendant was a mere stranger, and an unauthorized wrong doer, and had no right to touch the goods under the circumstances, and the case therefore differs from those where the plaintiff's interest in the goods was diminished in value by lien or some ex post facto mode of payment. It was said that the plaintiff could not rightfully have removed these goods ; but I think that argument is too remote, and is well answered by *Keen*

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(a) 5 H. & N. 288. 294.

(b) 1 Cr. & M. 326.

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v. Priest (a), where it was said you cannot shew that the defendant might have seized other goods under the distress. The question then is, does this case come within any of those where the amount of the plaintiff's claim is affected by matter *ex post facto*? It would not be safe to say that the person who comes unlawfully on the premises of another and takes his goods, can pay himself his own debt out of their produce. The case is very like one that was put during the argument: suppose a landlord enters to distrain before any rent is due,—at *New Michaelmas* instead of *Old Michaelmas*, for instance,—he could not be allowed to keep possession of the goods and say to the tenant, “I will put them against your rent when it becomes due.”

My only doubt arose from *Chinery v. Viall (b)*. That was, however, a very peculiar case. The Court throughout it say that you cannot alter the law on this subject by changing the form of action, and admit the general principle as I have stated it; but they thought that was a case where the interest of the defendant as an unpaid vendor came in question: for, if the defendant had been sued for not delivering the sheep, the measure of damage could only have been the difference between the damage resulting from his not having done so and their price. They cite my brother *Blackburn's Treatise on the Contract of Sale*, but I do not think that our decision interferes with it, or the cases they cite. This is a case of bare tort, under colour of which the defendant has helped himself to the plaintiff's goods, and he had no more right to put against their value the rent due to him than he would have to put any other debt. The interest of the tenant was the real value of the goods, the plaintiff had no real charge or lien

(a) 4 H. 3 N. 236.

(b) 5 H. 3 N. 288.

pon them, and therefore that value was the measure of damages.

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BLACKBURN J. I am satisfied there ought to be a new trial, as I misdirected the jury respecting the measure of damages.

There cannot be much doubt that where a party sues for trespass or trover for goods, in which the other side has an interest, the measure of damages is the plaintiff's interest in them, after allowing for that of the defendant. *Troudlove v. Twemlow* (a) proceeded on that principle. There a landlord had rightfully seized growing crops, and would have had a right to keep them till he sold them: it was held, under the circumstances, that you were to look to the interest which he had in the crops; and the decision of the Court, as I understand it, was that the amount of damages was merely nominal, because the crops sold were not worth so much as the rent. The more recent case of *Chinery v. Viall* (b) proceeded on the same principle: in which the Court held that the defendant, being an unpaid vendor, who converted the goods in respect of which the action was brought, had an interest in them, which ought to have been allowed for in ascertaining the damages. Here the defendant's servant entered the plaintiff's premises and distrained on goods, and the distress was made by getting in a fastened window, which he had no right to do. Breaking the house and entering it in that way caused the distress to be altogether void, and the landlord trespasser ab initio; for there is a marked distinction between a distress being illegal from the beginning and becoming so by matter subsequent. The

(a) 1 C. & M. 326.

(b) 5 H. & N. 288.

1868. 11 G. 2. c. 19. s. 19. is carefully worded,—“where any
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 and any irregularity or unlawful act shall be afterwards
 done by the party or parties distraining, or by his, her
 or their agents, the distress itself shall not be deemed to
 be unlawful, nor the party or parties making it be deemed
 a trespasser or trespassers *ab initio*.” When, therefore,
 a party is a trespasser *ab initio* the statute does not
 apply, and the matter remains as at common law. Here
 the defendant having broken the plaintiff’s house, was a
 trespasser at common law, and had no defence against
 an action of trespass for taking his goods. Then, however,
 considering that, as the goods were in the tenant’s house,
 the landlord could have come in a regular way to take
 them, and the tenant could not have got them out
 without their being subject to being followed and dis-
 trained as a fraudulent removal, I thought the real
 damage sustained was the difference between the value
 of the goods and the amount of the rent, and that
 was what I conveyed to the minds of the jury. *Kear*
v. Priest (a) shews that that was a mistake, and on
 principle I now think it was. In that case the land-
 lord had seized sheep of the tenant, and everything
 said there about the goods seized having been sold to
 pay the rent applies here: for if the landlord there
 had seized the other goods the result would have been
 the same. He was a wrong doer who seized and sold
 the goods in that wrongful way, and therefore could not
 reduce his wrong by shewing that he had an interest
 in them and might have proceeded rightfully to take
 them: and *Watson* B. states, p. 240, that there was a
 case on the Northern Circuit where *Cresswell J.* (who

(a) 1 H. & N. 236.

is considered a good authority), ruled that where a tenant's goods were distrained before sunrise, the measure of damage was their full value. Distraining goods before sunrise is much the same as taking them in the daylight in the way that was done in the present case.

Rule absolute.

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The QUEEN against PEARCE.

Monday,
January 12th.

An unmarried woman having recovered judgment in a County Court against *A.*, obtained a judgment summons against him from the Sheriffs' Court, *London*, under stat. 15 & 16 *Vict. c. lxxvii.* At the hearing, it having been ascertained that the plaintiff had married in the meantime, the Judge amended the title of the cause by inserting the husband's name: Held that he had no power to do so, and, consequently, that an indictment for perjury could not be maintained against the defendant for false evidence given at that hearing.

Perjury.
County Court.
London (City)
Small Debts
Act, 15 & 16
Vict. c. lxxvii.
Judgment
summons.
Amendment.

PERJURY. The indictment, after alleging that, on the 9th *March*, 1855, one *Henrietta Grundy* recovered judgment against the defendant *Benjamin Workman Pearce*, in the County Court of *Kent*, holden at *Gravesend*, and afterwards, on the 24th *January*, 1861, and after she had been married to one *Walter Smith*, and while the defendant was dwelling and carrying on business in the city of *London*, and the judgment remained unsatisfied, *Henrietta Grundy*, otherwise *Smith*, obtained a summons from the Sheriffs' Court, *London*, under the 15 & 16 *Vict. c. lxxvii.*, by which the defendant was required to appear personally in that Court on the 12th *February*, 1861, who personally appeared accordingly, proceeded; "and then and there the Judge of the said Court, *Robert Malcolm Kerr*, Esq., did amend the said summons by adding thereto the name of the said *Walter Smith*, the

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husband of the said *Henrietta Grundy*, otherwise *Smith*."

The indictment then alleged that the summons was adjourned to the 14th *February*, when the defendant again appeared in person, "and was then and there, before *Robert Malcolm Kerr*, Esq., then and there being the judge of the said last mentioned Court, duly and in due form of law, and according to the provisions of the said last recited Act, examined upon oath touching the manner and circumstances under which he the said *Benjamin Workman Pearce* contracted the debt for which the said *Henrietta Grundy* had recovered judgment on the said 9th day of *March*, in the year of our Lord 1855, in the said County Court of *Kent*, holden at *Gravesend* as aforesaid, he the said *Robert Malcolm Kerr*, having then and there full and sufficient power and competent authority to examine the said *Benjamin Workman Pearce* touching the manner and circumstances under which he contracted the said debt, and having full and sufficient power and authority to administer the said oath to the said *Benjamin Workman Pearce* in that behalf." The indictment then alleged the materiality of several matters sworn to by the defendant on that occasion, and assigned perjury upon them, concluding in the usual way.

On the trial, before *Cockburn* C. J., at the ~~*Middlesex*~~ Sittings after *Michaelmas* Term, 1861, the facts stated in the indictment having been proved, it was objected, on the part of the defendant, that the judge of the Sheriffs' Court of the city of *London* had no power to amend the judgment summons, &c., so that, there being no valid summons or cause before him, the proceedings in respect of which the alleged perjury took place were coram non judice, and that the rights of the plaintiff *Henrietta Grundy* in the judgment had merged

in her husband. *Cockburn C. J.*, however, reserving leave to move the Court on the point, left the case to the jury, who found a verdict of guilty.

H. James, in *Hilary Term*, 1862, obtained a rule to enter the verdict for the defendant according to the leave reserved, or to arrest the judgment.

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H. S. Giffard and *O. B. C. Harrison*, now shewed cause.—The *London City Small Debts Extension Act*, 1852, 15 & 16 *Vict. c. lxxvii.*, under which the present proceedings arose, enacts in its 88th section, “It shall be lawful for any party who has obtained a judgment or order in the Court, &c., for the payment of any debt or damages, or costs, which judgment or order shall not be satisfied, and for any party who has obtained a judgment or order in any County Court established under or by virtue of the before mentioned Act for the more easy recovery of small debts and demands in *England*, which last-mentioned judgment or order shall not be satisfied, to obtain a summons from the Court, in case the party against whom such judgment or order shall have been obtained shall then dwell or carry on business or have employment within the city of *London* or the liberties thereof, such summons to be in such form as shall be directed by the rules made for regulating the practice of the Court; and it shall be lawful for any party who has obtained any such judgment or order in the Court, which said last-mentioned judgment or order shall not be satisfied, to obtain a summons from any County Court established under or by virtue of the last-mentioned Act for the more easy recovery of small debts and demands in *England*, within the limits of which Court the party against whom such last-mentioned judgment or order shall have been obtained shall

1863. then dwell or carry on business, such last-mentioned
THE QUEEN summons to be in such form as shall be directed by
V. the rules made for regulating the practice of the said
PEARCE. County Court, which summonses, as the case may be,
are to be respectively served personally upon the person
to whom it is directed, requiring him to appear at such
time as shall be directed by the said rules, to answer
such things as are named in such summons ; and if he
shall appear in pursuance of such summons, he may be
examined upon oath touching his estate and effects, and
the manner and circumstances under which he contracted
the debt or incurred the damages or liability which is
or are the subject of the action in which judgment has
been obtained against him, and as to the means and ex-
pectations he then had and as to the property and means
he still hath of discharging the said debt or damages
or liability, and as to the disposal he may have made of
any property ; and the person obtaining such summons
as aforesaid, and all other witnesses whom the judge
shall think requisite, may be examined upon oath,
touching the inquiries authorized to be made as afore-
said ; and the costs of such summons and of all pro-
ceedings thereon shall be considered costs in the cause.”
Rule 91 (a) of the rules of practice framed under the
powers of that Act, provides:—“Where the name or
description of a plaintiff in the summons is insufficient
or incorrect, it may at the hearing be amended at the
instance of either party by order of the judge, on such
terms as he shall think fit, and thereupon the cause
shall proceed, as to set-off and such other matters, as if the
name or description had been originally such as it appears

(a) The three rules here referred to are the same with rules 94,
98 & 154 respectively of the rules and orders for regulating the practice
of the County Courts.

after the amendment has been made." And rule 95 :
 "Where it appears at the hearing that a less number of persons have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added by order of the judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper persons had been originally made parties ; and if such person shall, either at the hearing or some adjournment thereof, personally, or by writing signed by him or his agent, consent to become a plaintiff in manner aforesaid, the judge shall then pronounce judgment as if such person had originally been a plaintiff ; but if such person shall not consent to become a plaintiff in manner aforesaid, either at the hearing or an adjournment thereof, judgment of nonsuit shall be entered." But even supposing what was done here by the judge of the Sheriffs' Court to have been irregular it was not such an irregularity as rendered the whole proceedings coram non judice.

The objection here is probably founded on rule 158 : "Execution on a judgment shall not issue by or against any person not a party to the suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same as in ordinary cases." Execution on a judgment is a ministerial act of the bailiff of the Court, but this proceeding is not an execution in the sense of that rule, the sole object of which was, like a scire facias, *Penoyer v. Brace* (a), to bring before the notice of the judge any new party that may be introduced into the proceedings. What was done here affected the process only, and not the jurisdiction. [Crompton J. There was no such judgment as *Smith and Wife v. Pearce*. I am inclined to think that, by

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(a) 1 *Ld. Raym.* 244.

1863. amending, the judge of the Sheriffs' Court made the
 The QUEEN matter worse. For if it was unnecessary to proceed by
 V. scire facias, or what is analogous to it, the name in the
 PRARCE original judgment was the correct one to be used in all
 future proceedings.] The crime of perjury cannot be
 dependant on an act done by a Judge. In *Reg. v. Mil-*
lard (a), on sect. 30 of stat. 7 & 8 G. 4. c. 30., to
 prevent malicious injuries to property, which requires
 informations under it to be laid on oath, it was held
 that the oath was mere matter of procedure, and not
 a condition precedent to giving the magistrates juris-
 diction. [*Crompton J.* There the party, by appearing,
 waived the want of a regular summons. *Wightman J.*
 In what cause did the defendant here give evidence?]
 In no cause at all, but on an inquiry as to his liability
 and means of paying a debt on which judgment had
 already been recovered. [*Crompton J.* The summons
 being founded on the judgment, must pursue it.]

H. James, who appeared to support the rule, was not
 called on.

COCKBURN C. J. This rule must be absolute. I
 regret the escape from punishment of a man who has
 been convicted of perjury on the merits, but we must
 administer the law according to its rules. To constitute
 the offence of perjury it is essential that the party be
 sworn in a certain cause: and here the defendant was
 sworn in a cause which had no existence. The judgment
 summons was entitled as between *Henrietta Grundy* and
 the defendant; and properly so, because it was a judgment
 which had been recovered by the wife alone. Meantime
 she marries, still, in consequence of her not having taken

(a) 1 *Dears'*. C. C. 166.

steps to make the husband a party, she went on in her own name. The judge thought, (wrongly as it now appears), that he had jurisdiction to amend by adding the name of the husband. That was an excess of power on his part. But then in the cause so altered the defendant was sworn and examined: he therefore committed perjury in a cause which had no existence, and, consequently, *coram non judice*.

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WIGHTMAN, CROMPTON and MELLOR JJ. concurred.

Rule absolute.

PAULL and another, Assignees, &c., *against* BEST.

1. The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106., enacts in its 129th section, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of the filing of such petition." Held that, in order to bring a case within this enactment, the act of bankruptcy must be one to which the title of the assignees could relate.

2. On the 27th March, 1861, J. P. committed an act of bankruptcy under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. s. 67., by making a fraudulent conveyance of all his goods and chattels to A. B., his landlord, but no attempt was made by any creditor to obtain an adjudication upon it, nor did it appear that there was any creditor who could have done so. On the 11th October, the day from and after which The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134., came into operation, A. B. made a distress on the goods of J. P. for four years' rent; and, on the 17th October, J. P., who was not a trader, was adjudicated bankrupt on his own petition under sects. 86, 87 of the last mentioned Act, and assignees appointed: held, that the title of the assignees could not relate back to the act of bankruptcy in the preceding March, and consequently, the 129th section of the first mentioned statute did not apply.

Thursday,
January 22d.

Bankrupt
Law Con-
solidation Act,
1849, 12 & 13
Vict. c. 106.
ss. 63, 129.
Bankruptcy
Act, 1861,
24 & 25 Vict.
c. 134. ss. 86, 87.
Assignees.
Title by re-
lation.
Landlord.
Distress.

THIS was an action brought by the assignees of the estate and effects of *Joseph Paull*, a bankrupt. The declaration alleged that, on the 27th March, 1861, *Joseph Paull* was a trader within the meaning of the laws then in force relating to bankrupts, and liable to be

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made bankrupt, and by his deed, dated the day and year last aforesaid, then fraudulently made and executed a conveyance of all his goods and chattels to the defendant, with intent to defeat and delay the creditors of him *Joseph Paull*, and thereby then committed an act of bankruptcy within the meaning of the statutes then in force concerning bankrupts; and afterwards, and before *Joseph Paull* became bankrupt, to wit, on the 11th *October*, 1861, the defendant made and levied a distress upon divers goods which were then of *Joseph Paull* in and upon a dwelling house, homestead, farm and lands of which *Joseph Paull* had been tenant to the defendant, and then in the occupation of *Joseph Paull* as such tenant, at the yearly rent of 207*l.* 2*s.*, for 828*l.* 8*s.*, as and for and being four years' arrears of the said rent, and the defendant sold the said goods as and for such distress for the said arrears. That, after the making and levying the said distress, and before the commencement of this suit, to wit, on the 17th *October*, 1861, *Joseph Paull* became and was duly adjudged bankrupt, upon his petition for adjudication against himself on oath then duly filed of record in the Bankruptcy Court, *London*, and prosecuted in the said Court according to the statutes then in force concerning bankrupts. And that the defendant, by means of the said distress, made and levied a distress after the said act of bankruptcy upon the said goods of the said bankrupt, and made the same available for more than one year's rent accruing prior to the day of the filing of the said petition, (that is to say) for four years' arrears of rent accruing prior to the said day of the filing of the said petition, whereby the defendant had recovered and received, and the plaintiffs, as assignees as aforesaid, were and are deprived of four

years' arrears of the said rent, instead of one year's arrears, contrary to the form of the statute in such case made and provided.

Plea. After the passing of The Bankruptcy Act, 1861, and after the 11th *October*, 1861, the said *Joseph Paull*, in pursuance of the said Act, duly filed a petition in the Court of Bankruptcy for the *London* District, shewing that he the said *Joseph Paull*, not being a trader, and having resided for six calendar months next immediately preceding the date of the said petition within the District of the said Court, was unable to meet his engagements with his creditors, and praying that adjudication of bankruptcy might be made against him, and the said *Joseph Paull* was afterwards, on the day of the filing of the said petition, and in pursuance of the said Act, duly found to have become bankrupt, within the true intent and meaning of the laws of bankruptcy, by the filing of the said petition, and declared and adjudicated bankrupt accordingly; and the plaintiffs were afterwards duly appointed to be and act as creditors' assignees in the said bankruptcy. That the said petition and adjudication were the petition and adjudication mentioned in the declaration respectively, and that the plaintiffs were suing in this action as assignees in the said bankruptcy. And that the said alleged deed was made and executed by the said *Joseph Paull* as therein mentioned a long time, and more than six months, before the filing of the said petition by the said *Joseph Paull* as aforesaid, and before the passing of The Bankruptcy Act, 1861, and that the said distress was made and levied by the defendant before the filing of the said petition.

Demurrer, and joinder therein.

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1863. The case was argued, at the Sittings in banc after
PAULL *Michaelmas* Term, 1862, on the 26th *November*, before
v. WIGHTMAN, BLACKBURN and MELLOR JJ.
BEST.

Harington, in support of the demurrer.—The title of the plaintiffs, as assignees, had relation back to the act of bankruptcy committed in *March*, 1861, and consequently, by stat. 12 & 13 *Vict. c. 106.*, the distress was rendered invalid for more than one years' rent. That statute, which was passed to amend and consolidate the laws relating to bankrupts, enacts, in its 67th section, "if any trader liable to become bankrupt shall depart this realm, or being out of this realm shall remain abroad, or shall depart from his dwelling house or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested or taken in execution, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

And, by sect. 129, "no distress for rent made and

evied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of the filing of such petition, but the landlord or person to whom the rent shall be due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available."

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BEST.

The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.*, took effect from and after the 11th *October*, 1861, and by sect. 232, is to be construed together with so much of the 12 & 13 *Vict. c. 106.* as remains unrepealed as the Act. By sect. 230 the Acts and parts of Acts set forth in its schedule G., to the extent to which they are herein expressed to be repealed, and all other Acts or parts of Acts which are inconsistent with it, are repealed. By that schedule many parts of 12 & 13 *Vict. c. 106.* are repealed, but *not* sect. 67 or 129. Here the bankruptcy took place under the 24 & 25 *Vict. c. 134. ss. 86, 87.*; but, in order to bring a case within sect. 129 of the former statute, the act of bankruptcy need not be that in which the proceedings are ultimately founded. *Nicholson v. Gooch* (a) and some other cases will be relied on, but none of them were cases where a distress had been made by a landlord.

Montague Smith (*Kingdon* and *Hooper* with him.)—The act of bankruptcy mentioned in sect. 129 of stat. 12 & 13 *Vict. c. 106.* must be understood to mean the act of bankruptcy on which the proceedings in

(a) 5 *E. & B.* 999.

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bankruptcy are founded. Were this otherwise, the rights of a landlord might always be defeated by proof of an act of bankruptcy after any lapse of time; whereas sect. 88 enacts, "no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy or the filing of any petition for adjudication of bankruptcy against him, and that no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt." Moreover, under this statute, the mere filing a declaration of insolvency is an act of bankruptcy, sects. 70. 93.; and here the party was not made bankrupt by his creditors in the ordinary way, but is a non-trader made so on his own petition; in which case it has been held that the title of the assignees does not relate back to an alleged fraudulent preference made by him; *Stevenson v. Neunham*, in error (a). [Blackburn J. That case, though subsequent to stat. 12 & 13 Vict. c. 106., was decided on the previous stat. 7 & 8 Vict. c. 96.] The majority of the Court, p. 301, thought that that would make no difference. *Nicholson v. Gooch* (b) and *Monk v. Sharp* (c), both decided under the 12 & 13 Vict. c. 106., are to the same effect. Wightman J. In that last case there was no prior act of bankruptcy, so that the opinion given there was extra-judicial.] The adjudication, being under the new Act, cannot deprive the defendant of his rights under the former Act. [Blackburn J. Sect. 230 of stat. 24 & 25 Vict. c. 134. contains a saving of every "proceeding pending, or any right that has arisen or may

(a) 13 C. B. 285.

(b) 5 E. & B. 999.

(c) 2 H. & N. 540.

arise, &c., under or by virtue of any of the Acts or parts of Acts repealed."'] 1863.

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Harington, in reply.—The answer to the argument founded on hardship is, that there would be a still greater hardship on the tenant if the landlord were allowed to distrain for rent after any lapse of time. *Monk v. Sharp* (a) has been already distinguished; and *Stevenson v. Neunham* (b) was not decided on the 12 & 13 Vict. c. 106., so that there also the dicta are extra-judicial. [*Blackburn J.* The difficulty seems to arise from sect. 101 of stat. 12 & 13 Vict. c. 106., which is not repealed by 24 & 25 Vict. c. 134., whence it appears that, when the creditor petitions, the adjudication is to be on proof of the petitioning creditor's debt and of the trading and act of bankruptcy, but when the debtor himself does so, it is only on proof of the filing of a declaration of insolvency.]

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN J. We have considered this case, which was argued before us on the 26th *November* last, and are of opinion that the defendant is entitled to our judgment.

It appears, upon the pleadings in this case, that on the 11th *October*, 1861, the defendant made and levied a distress upon the goods of *Joseph Paull* for four years' arrears of rent, and that afterwards, on the 17th *October*, the said *Joseph Paull* was adjudged a bankrupt upon his own petition.

By the 129th section of the 12 & 13 Vict. c. 106.,

(a) 2 H. 4 N. 540.

(b) 13 C. B. 285.

1863. (and which section is still unrepealed), "No distress
for rent made and levied after an act of bankruptcy
upon the goods or effects of any bankrupt, whether before
or after the issuing of the fiat or the filing of the
petition for adjudication of bankruptcy, shall be avail-
able for more than one year's rent accrued prior to the
date of the fiat or the day of the filing of such petition."

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The act of bankruptcy upon which the adjudication proceeded being the filing of a petition by the bankrupt for adjudication against himself, which is made an act of bankruptcy by the 86th and 87th sections of the 24 & 25 *Vict. c. 134.* (which came into operation on the 11th *October*, 1861), and which petition appears not to have been filed until after the distress was made and levied, the 129th section of the 12 & 13 *Vict. c. 106.* would not apply as far as that act of bankruptcy is concerned: but it appears by the pleadings that the bankrupt had committed a previous act of bankruptcy, on the 27th of *March*, 1861, by making a fraudulent conveyance of all his goods and chattels to the defendant; and it was contended for the plaintiffs that, as the distress was made and levied after *that* act of bankruptcy, the case was within the 129th section of the 12 & 13 *Vict. c. 106.*, the words of that section being very general, that no distress for rent made and levied after an act of bankruptcy shall be available for more than one year's rent. The act of bankruptcy however, committed on the 27th of *March*, 1861, was not that upon which the adjudication of bankruptcy proceeded, nor was any attempt made by any creditor to procure an adjudication in bankruptcy upon that act; and it appears to us that, to bring the case within the 129th section of the 12 & 13 *Vict. c. 106.*, the act of bankruptcy must be one to which the title of

assignees could relate. It appears by the pleadings, that, at the time of the petition and adjudication, the bankrupt was not a trader at all, and the proceedings in bankruptcy were under the 24 & 25 *Vict. c. 134.*, which abolished the distinction between traders and non-traders. It does not appear, by the pleadings in this case, that at the time of the distress made and levied, there was any creditor who could have obtained an adjudication against the bankrupt, or that he was amenable to the bankruptcy at all, except upon his own petition.

In the cases of *Stevenson v. Newnham, in error (a)*, *Nicholson v. Gooch (b)*, and *Monk v. Sharp (c)*, were cited upon argument as authorities to shew that in such a case as the present there is no relation to any previous act of bankruptcy, and we are of opinion, that the act of bankruptcy contemplated by the 129th section of the 12 & 13 *t. c. 106.* must be one to which relation might be made by the assignees under the adjudication in bankruptcy, and that the act of bankruptcy in question is not such an act, and that our judgment must be for the defendant.

Judgment for the defendant.

(a) 13 *C. B.* 285.

(b) 5 *E. & B.* 999.

(c) 2 *H. & N.* 540.

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Thursday,
January 15th.

Ex parte HAYWARD.

*Justices of
the peace.
Summary
convictions.
Clerk to jus-
tices.
11 & 12 Vict.
c. 43. ss. 14, 30.*

1. Justices of the peace are bound by stat. 11 & 12 *Vict. c. 43. s. 14.* to lodge with the clerk of the peace all summary convictions which take place before them, in order that the same may be filed among the records of the Quarter Sessions.

2. A mandamus does not lie to their clerk for this purpose, even though he may have received the fees for drawing up such convictions allowed under sect. 30 of that Act.

F. *J. SMITH*, on the part of *W. W. Hayward*, clerk of the peace for the city of *Rochester*, moved for a rule calling on *R. Prall*, clerk to the justices there, to shew cause why a mandamus should not issue commanding him to return to the Court of Quarter Sessions, from the books in his possession, all summary convictions before the justices during a specified period, in order that the same might be filed among the records of the Quarter Sessions. The clerk to the justices refused to make the return, although he had received a fee of 2s. 6d. for drawing up each conviction: and the justices, by a majority, refused to make an order on him to make it.—11 & 12 *Vict. c. 43. s. 14.*, after providing for the hearing of complaints and informations before justices of the peace, proceeds, “and if he or they convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction shall afterwards be drawn up by the said justice or justices in proper form, under his or their hand and seal or hands and seals,

and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the General Quarter Sessions of the peace.”

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Ex parte
HAYWARD.

By sect. 30, the fees of the clerk of the peace, clerk of the special sessions, or clerk of the petty sessions, or clerk to any justice or justices out of sessions, are to be settled as therein prescribed. It is important that these documents be returned to the Quarter Sessions, as they are the only evidence of previous convictions before the justices. [*Crompton J.* Your application should have been against the justices. The Legislature have not imposed this duty on their clerk, who is only their servant.]

PER CURIAM. (WIGHTMAN, CROMPTON and MELLOR JJ.) There can be no doubt that these convictions ought to be returned to the clerk of the peace. The justices are bound to direct their clerk to return them, and, if they do not, are perhaps indictable for disobeying the statute. But we cannot direct the *clerk* to make the return.

Rule refused.

1863.

Monday,
January 26th.

20 & 21 Vict.
c. 43. s. 2.
Transmission
of case to
superior Court.
Town agent.
Sending by
post.

In re BANKS, appellant, GOODWIN, respondent.

1. A party convicted by justices on an information applied to them for a case for a superior Court, under stat. 20 & 21 Vict. c. 43. s. 2. The case was delivered by the justices' clerk to the appellant's attorney on the 31st December, 1862, who gave notice of appeal and a copy to the opposite attorney; and on the 1st January, 1863, sent by post the original to his London agent to be lodged in Court. The London agent received the case the next day, but did not lodge it until the 10th: held, that the case had not been duly transmitted to the Court according to the statute.

2. *Quære* whether, if such a case is duly put into a regular course of transmission to the Court, *e. g.* by post, and does not reach it within time in consequence of something over which the sender has no control, this is a compliance with the statute.

GRAY obtained a rule nisi, in this Term, to strike out of the Crown paper a case of *Banks*, appellant *Goodwin*, respondent, stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43. sect. 2; on the ground that the provisions of that statute had not been complied with.

The appellant had been charged before two justices for the county of *Stafford*, sitting at *Leek*, on an information laid by the respondent, for unlawfully fishing, and convicted in a penalty of 5*l.* Having applied to the justices, under stat. 20 & 21 Vict. c. 43. s. 2., for a case for the opinion of this Court, it was, on the 31st December, 1862, delivered by their clerk to the appellant's attorney, who delivered a copy of it, with notice of appeal, to the respondent's attorney, and on the 1st of January, 1863, transmitted the original by post to his own London agent for the purpose of being lodged in the Crown office of this Court. The agent received the case on the 2d January, but did not lodge it until the 10th, when he

set it down for argument on the 24th, and gave notice accordingly to the town agent of the respondent's attorney.

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In re
BANKS,
appellant,
GOODWIN,
respondent.

McMahon shewed cause.—Stat. 20 & 21 *Vict. c. 43.* enacts, sect. 2: “After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon, of one of the superior Courts of law to be named by the party applying; and such party, hereinafter called ‘the appellant,’ shall within three days after receiving such case, transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given hereinafter called the respondent.”

If this statute had required notice of the appeal to be “given to one of the Masters of the Court,” as is required by The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 37.*, it would not be complied with until the case was *lodged* in the Court. But it uses the word “transmit,” and the question is what is the meaning of that word. *Richardson's Dictionary* defines it “to send over or across: to send, to pass over (to another),” and it is therefore enough if the party

1863.

In re
BANKS,
appellant,
GOODWIN,
respondent.

does all he reasonably can to ensure its arrival at the Court in ordinary course. Thus, if he sends it by post, and in consequence of a delay in the post office, or of the line of railway being broken up by a flood, it does not arrive in time, he is not responsible. It is however to be observed that the statute only says he "shall within three days transmit," not "shall transmit within three days." Here the case was sent through the town agent, which the officers of the Crown Office say is the usual practice. On an opposite construction, if the case reached the town agent on the day immediately preceding the *Christmas* or *Easter* holidays, the right of appeal would be lost. [Cockburn C. J. If the case, after it was sent off, were arrested on its road by some convulsion of nature, or by the act of some person for whose conduct the sender is not responsible, that might be sufficient. But suppose the appellant started from the country with the case in order to bring it to town, and stopped on the way to amuse himself, or suppose he sent it by a special messenger, who did so, it cannot there be said to be in the course of transmission. Is not the sending it to an agent to be forwarded, who delays it in his office, the same thing?] The appellant's contention seems supported by the language of sects. 6 and 7, the former of which, sect. 6, says, "The Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon, &c." And by sect. 7. "The Court for the opinion of which a case is stated shall have power, if they think fit, to cause the case to be sent back for amendment, and thereupon

the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended." Hence it appears that "send back," in sect. 7, is a translation of "remit," in sect. 6.

There is no express decision on the point, for, though several cases have been decided on this subject, none of them touch it. *Woodhouse*, appt., *Woods*, respt. (a), decides that giving the respondent notice in writing of the appeal, with a copy of the case, is a condition precedent to the right to have it heard. *Morgan*, appt., *Edwards*, respt. (b), decides that transmitting the case to the Court is also a condition precedent, and cannot be waived; but there the case had not been lodged in time, and no notice had been sent to the respondent. *Pennell*, appt., *The Churchwardens of Uxbridge*, respts. (c), *Blackburn J.* decided that the case must be transmitted to the Court within three days after the receipt of it by the appellant. In *Ashdown*, appt., *Curtis*, respt. (d), notice of appeal was not given to the respondent before the case was lodged in Court. The case had been delivered to the appellant on the 7th *February*; on *Saturday*, the 8th, he sent it to the Crown Office, and also a letter by post to the respondent containing notice of appeal and the case, which the latter received in due course of post on *Sunday*: *Wightman J.* held that the respondent could not be said to have had notice until he received it on *Sunday*, and that was too late. [*Blackburn J.* That decision is against you, because, if putting the case into the post office is equivalent to giving notice, the notice there was in time.] These cases construe the section too stringently, in taking for granted that

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appellant,
GOODWIN,
respondent.

(a) 29 *L. J. M. C.* 149; 6 *Jurist*, *N. S.* 421. (b) 5 *H. & N.* 415.

(c) 8 *Jurist*, *N. S.*, 99; 31 *L. J. M. C.* 92.

(d) 8 *Jurist*, *N. S.* 511; 31 *L. J. M. C.* 216.

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"transmitted" means "lodged in Court." It is a penal enactment as regards the appellant, for if the appeal not transmitted as directed he not only loses his right appeal, but forfeits the recognizances which he is required by sect. 3 to give before a case can be delivered to him by the justices. [He cited *Reg. v. The Justices of the North Riding*, 7 Q. B. 154.]

Gray (*Davenport* with him), in support of the rule. This statute gives the parties to informations before justices a right which they did not previously possess of appealing to one of the Courts at *Westminster*. The Legislature has, however, given that right subject to conditions, one of which is that the appeal be transmitted to the Court within three days after receipt of it from the justices. The primary meaning of "transmit" is "to put over," from one place to another, and there is no transmission until the putting over is completed; at the same time it must be conceded that transmit is not always used in that sense. Transmission cannot, however, mean sending the case off to the Crown Office; but means *lodging* it there. The construction of the other side would lead to this absurdity, that the appellant might keep the case in his pocket until he had served the other party with notice; and, as that party has no means of forcing on the appeal, the execution of the conviction might be indefinitely suspended. [*Crompton J.* Sect. 6 seems to use the word in your sense, for it says: "The Court to which a case is transmitted shall hear and determine the question or questions of law arising thereon." *Cockburn C. J.* The Legislature could hardly have meant that no difference was to be made between an appellant living in a county adjoining the metropolis

and one living 100 miles from it.] [They were then stopped.]

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appellant,
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COCKBURN C. J. We are all agreed that this rule should be made absolute, although we are not of one accord as to the grounds.

I am quite satisfied that the interpretation sought to be put on stat. 20 & 21 *Vict. c. 43, s. 2.*, by Mr. *McMahon, i. e.* that the mere act of *sending off* the case, the starting it on its way to the Court which it is meant to reach, is enough, is not the correct one. If, indeed, a party in the country sends off his case, so that, throughout its progress to the Court it may be said to be in the course of transmission, I think that would be sufficient. For we are not to put a strained construction on the word "transmit," but see what was the intention of the Legislature when they passed it, and what was the object they meant to secure. Their meaning was that the party who obtains the case shall send it off within three days, so that it shall reach the Court with the greatest dispatch—that would satisfy the exigency of the statute. Here that condition has not been complied with. For, although this case was sent off by the appellant from the country within three days, yet, when it reached his agent in *London*, that agent, instead of sending it on without delay, so as to be on its way to the Court, kept it for eight days lying in his office. I cannot hold that a document in the course of being transmitted which, instead of being sent in the ordinary course of things, remains in the hands of a party under such circumstances; and for the omission of that party during those eight days, the appellant is clearly responsible, seeing that that party was his agent.

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In re
TANKS,
appellant,
G. DWIN,
respondent.

The construction which is sought to be put on this statute by Mr. *Gray* is that the case is not transmitted to the superior Court until it is expedited on to the Court. But on that construction the agent here was equally in the wrong, for he did not expedite it until the three days had gone by.

The appellant has therefore failed to comply with a condition precedent, and his appeal consequently cannot be heard.

CROMPTON J. I incline to the opinion that the construction of the statute which Mr. *Gray* has laid before us is the correct one. There is some difficulty in the matter, but, looking at all the provisions of the statute, it seems to mean that the case shall be lodged in Court within the specified time, and there would be great inconvenience if that were not so. And it is very difficult to my mind to see that, while the case is in the hands of the attorney, it can be said to be transmitted to the Court: at any rate sect. 2 of the statute means that the case is to be sent off, and it might be sufficient if it were sent off in the usual course to the *London* agent to be forwarded to the Court. But the word "transmit" does not apply solely to cases decided in the country, for appeals may arise in town. In any view of the statute, I can see no difference between the attorney and the agent. Sending the case off may in some cases mean sending it on a course by which it might regularly come to the Court, but it is quite clear that if the attorney keeps it in his pocket that will not do. Therefore on the ground put by Mr. *Gray*, and also because this case cannot be said to be trans-

mitted while it is in the hands of the *London* agent, I agree that this rule must be made absolute.

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BANKS,
appellant,
GOODWIN,
respondent.

BLACKBURN J. One condition of an appeal of this kind being heard is, that the appellant shall, within three days, transmit it to the superior Court, and the question is, has that been complied with? As at present advised, I think the condition not complied with until the transmission is complete,—until the case is lodged with the Court, and that must be within three days. But it is not necessary to decide that point, and I give no final opinion upon it. Perhaps if the case had been put in the possession of an independent third party, *e. g.* the Post Office, and so put out of the control of the appellant, and there had been default in the Post Office, that would do, but I should be sorry if any thing I say were to encourage appellants to trust such matters to the Post. But here the case was sent by the appellant's attorney to his *London* agent, and retained in his hands considerably beyond the three days, and I consider the attorney and agent as the same. The appellant therefore has not in any sense complied with the requisites of the statute.

Rule absolute.

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Monday,
January 19th.

LYON and Wife against KNOWLES.

*Dramatic
Literary
property.
3 & 4 W. 4.
c. 15.
5 & 6 Vict.
c. 45.
6 & 7 Vict.
c. 68.
Partnership.*

K., the licensed proprietor of a theatre, under stat. 6 & 7 Vict. c. 68, entered into an arrangement with *D.* whereby *D.* had the use of the theatre for dramatic entertainments. *D.* provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. *K.*, on his part, paid for printing and advertising, furnished the lighting, door keepers, scene shifters and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of *K.*, who retained one half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to *D.* Among the pieces represented were two which *L.* had the sole liberty of representing or causing to be represented &c., as assignee of the author, under the Dramatic Literary property Acts, 3 & 4 W. 4. c. 15. and 5 & 6 Vict. c. 45. Held that no action under those statutes was maintainable by *L.* against *K.*, as the above facts did not shew that those pieces had been represented &c. by him, or that there was a partnership between *D.* and him so as to render him liable for the representation &c. of them by *D.*

THIS was an action under the 3 & 4 W. 4. c. 15.,

“To amend the laws relating to dramatic literary property.” The first count alleged that the defendant unlawfully represented, and caused to be represented, at certain places of dramatic entertainment, &c., without the consent in writing of the plaintiff, a certain dramatic piece, whereof the plaintiff was proprietor, and had the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment, &c., as assignee of the author.

The second count was in similar form on another dramatic piece.

The defendant pleaded the general issue, and traverses of the sole right of representation of the plaintiff and of the assignments. Issue.

On the trial, before *Blackburn J.*, at the Sittings for *Middlesex* after *Michaelmas* Term, 1861, it appeared that the plaintiff was assignee of the sole right of represent-

ing, or causing to be represented, the two pieces in question. The defendant was the licensed proprietor of a theatre at *Manchester*, and, in 1860, an arrangement was made between him and a person of the name of *Dillon*, by which the defendant let him the use of the theatre for the purpose of dramatic entertainments. Under this arrangement *Dillon* provided the Company, and had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The defendant, on his part, paid for printing and advertising, furnished the lighting, door keepers, scene shifters and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the doors was taken by servants of the defendant, who retained one half of the *gross* receipts as his remuneration for the use of the theatre, and handed the other half to *Dillon*. Among the pieces represented were those of which the plaintiff was assignee.

On this evidence it was objected, by the counsel for the defendant, that there was no proof that those pieces were represented, or caused to be represented, by the defendant; but the learned Judge, reserving leave to move to enter a verdict for the defendant on the plea of not guilty, left the case to the jury, who found a verdict for the plaintiff, damages 28*l*.

Pigott Serjt., having obtained a rule nisi accordingly, in *Hilary* Term, 1862.

Huddleston shewed cause.—This action is brought under stat. 3 & 4 *W. 4. c. 15.*, the first section of which enacts that “the author of any tragedy, comedy, play,

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1863. opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of *Great Britain* and *Ireland*, in the Isles of *Man*, *Jersey*, and *Guernsey*, or in any part of the *British* dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in

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which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorized such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority."

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By sect. 2, "if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, &c., by such author or other proprietors, in any Court having jurisdiction in such cases in that part of the said United Kingdom or of the *British* dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same."

Sect. 3 provides that "all actions or proceedings for any offence or injury that shall be committed against

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this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of no effect."

By 5 & 6 *Vict. c. 45. s. 20.* the term of the sole liberty of representing dramatic pieces given by the former Act is extended, and the benefits of both Acts are extended to musical compositions.

The defendant represented these pieces within the meaning of these statutes. He was the proprietor of the theatre where their representation took place, and was licensed as such under 6 & 7 *Vict. c. 68.*, whereby all houses or other places of public resort for the public performance of stage plays are required to be licensed by the lord chamberlain or justices of the peace, sects. 2, 3, 5, 6; which license shall not be granted to any person except the actual and responsible manager for the time being, sect. 7. The object of the statute was to give authors the most extensive powers of enforcing their copyrights in their works, an intention which would be frustrated, and a wide door to fraud opened, if persons in the position of the defendant could act as he has done without infringing those rights. The money for the representation of these pieces was collected by his servants, and he received half of it as his profit; and he cannot divest himself of responsibility by delegating to another person the right of choosing the pieces to be played, and the control over the parties playing them. If an actor takes a benefit the house is his for the night, but that does not exempt the lessee from responsibility for what is done on that occasion. [*Crompton J.* If the parties here had divided the *net* profits, they might perhaps be looked on as partners, but they divided the *gross* profits.] That strengthens the plaintiff's case.

The other side will probably rely on *Russell v. Briant* (a). In that case the defendant, who was keeper of a tavern, let a room in it for the purpose of giving public vocal and musical entertainments, furnished the platform, benches and lights, and allowed placards describing the intended performances to be stuck up in the tavern. Programmes of the entertainment were circulated by the party hiring the room, and tickets of admission were sold by him, and also by a servant of the defendant at the bar of the tavern,—one ticket being sold by the defendant himself. Two musical compositions of which the plaintiff there was author and proprietor having been played and sung in that room, this was held not a representation or causing to be represented by the defendant within the stat. 3 & 4 W. 4. c. 15. and 5 & 6 Vict. c. 45. Maule J. says during the argument, p. 864, "All who concur in causing a thing to be done, are persons who cause it to be done." Wilde C. J., in delivering the judgment of the Court, says, p. 848, "We think,—having regard to the object of the Act, and the language of the 2d section, that no one can be considered as an offender against the provisions of it, so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright. And, if it were to be held, that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the Act, such a doctrine would, we think, embrace a class of persons not at all intended by the

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(a) 8 C. B. 836.

1863. Legislature." But the defendant in that case was not
 ——— LYON in the same position as the defendant here, who has
 V. supplied for this performance the necessary music,
 KNOWLES. together with the supernumeraries and scene shifters.

Pigott Serjt. (*Milward* with him), in support of the rule.—The arrangement by which the defendant was to take the money at the doors was only a mode of payment. All the evidence shews that he had no intention of violating the statute. [*Blackburn* J. That is not the question. If the defendant violated the statute through a blunder, however innocent in intention, he must make compensation to the plaintiff.] It is a contradiction to say that a man who could neither prevent nor control the representation of a particular piece, as was the case here, is the party representing it. A man who lets a house to another is not responsible for an illegal act done in it by the person who has hired it. *Russell v. Briant* (a) is an authority for the defendant. [He was then stopped.]

COCKBURN C. J. This rule must be made absolute. If *Dillon* and his company could be in any sense regarded as the company of the defendant, he might be considered as representing, or causing to be represented, the piece in question. But the facts are quite otherwise.

As I understand the evidence, the defendant made over to *Dillon* the use of this theatre, to perform therein with his company such pieces as he should be minded to represent there. All that the defendant did was to stipulate that his servants should receive the proceeds,

(a) 8 C. B. 836.

in order that the remuneration which he contracted for should be secured to him. But the theatre, with its accessories, lights, band, &c., were under the direction and control of *Dillon*, and the defendant had divested himself both of the right to interfere in the choice of the pieces to be represented, and of any veto to be exercised by him as to providing, acting or representing any particular piece. The defendant is nothing more than the proprietor of the theatre, who has transferred for the time the exercise of all his rights in it as such to *Dillon*. It therefore appears to me that *Dillon* is the person who represented any pieces represented there while he had the sole possession. If it had been made out that there was a joint action or control over the performances by the defendant and *Dillon*, so that they could be considered partners, that might have been a very different matter. But here there was nothing in common between them except that the gross proceeds were shared. Does that make them partners? In order to constitute a partnership between two persons there must be a participation of profits between them as such, whereas here the stipulation was that the defendant should have half of the gross profits of the theatre in lieu of being paid any sum as rent for the use of it.

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CROMPTON J. I have arrived at the same conclusion. It is established by the decision in *Russell v. Briant* (a), and rightly, that the relation of landlord, who for money lets the use of a theatre to performers, is not sufficient under this statute to make him a person causing the representation of pieces in that theatre. And the ques-

(a) 8 C. B. 836.

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tion is, whether looking at the present case fairly, it amounts to more than this, that the rent of the theatre is to be paid by part of the profits. In one respect I do not agree with my brother *Pigott*:—I do not think that the defendant's divesting himself of control over the theatre would divest him of liability if he and *Dillon* were partners. Suppose there had been an agreement of partnership between the defendant and *Dillon* that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them, I should think the act of either was the act of both. But the authorities clearly shew that two persons merely receiving payment out of the *gross* profits of a business does not make a partnership between them, even as against the world. The law is distinctly so laid down in the authorities cited in the note to *Waugh v. Carr*, 2 *H. Bl.* 235, and 1 *Smith's Lead. Cas.* 833—841, 5th ed.

BLACKBURN J. I am of the same opinion. The question is, whether the defendant represented or caused to be represented these pieces because they were represented at his theatre, with the assistance of servants, lights, &c., furnished by him. Even apart from authority, I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other. A familiar example may be found in the case of a man letting a ready furnished house, leaving an old servant in it. Suppose the tenant gave a dinner, which was cooked by that servant, who also attended on

him at it, and for which the plates and furniture of the landlord were used, no one could say that in any sense of the words the landlord gave that dinner. Then as to authority. In *Russell v. Briant* (a) the fact of the landlord of a tavern having let the room, and furnished the lights, &c., for a theatrical entertainment was held no evidence of his representing or causing to be represented any of the pieces represented there. The only difference between that case and the present is that in *Russell v. Briant* the room was paid for at a certain rate per night, here it is paid for by half of the gross receipts; which, having been collected at the door by the servants of the defendant, half was handed over to the person who hired the theatre, and half to the defendant, who therefore had security in the first instance for his money. The only question is, does that make a distinction between this case and that of *Russell v. Briant*? If the receipt of the money in this way was only a colourable pretence to escape the consequences of a partnership, I do not say that that would not have made a difference. Here, however, it was admitted at the trial that the transaction in evidence was not a colourable, but a fair and real one. I cannot see to that any partnership was created here. In the note 1 *Smith's Lead. Cas.*, p. 841, 5th ed., to which my brother *Crompton* has referred, a case is cited of *Ex parte Hamper* (b), where Lord *Eldon* says, p. 404, "the cases have gone farther to this nicety; upon a distinction so thin, that I cannot state it as established upon due consideration; that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a

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(a) 8 C. B. 836.

(b) 17 Ves. 403.

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certain share, that will not make him a partner: but, if he has a specific interest in the profits themselves, as profits, he is a partner." In another part of the same case he says, p. 412, "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner: but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons a partner." Here the defendant was only paid by half of the gross receipts.

Rule absolute.

Saturday,
January 31st.

BUCKLEY *against* GROSS and another.

Conversion.
Possession.
Confusion of
goods.
Metropolitan
Police Act,
2 & 3 Vict.
c. 71. ss. 29, 30.

Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the *Thames*. A fire took place in consequence of which the tallow melted and flowed down into the sewers, and thence into the river, from which several portions of it were unwarrantably taken by different persons. *A.*, one of these persons, sold some of it to *B.*, which was taken from him by the police, and he was charged before a police magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under The Act for regulating the Police Courts in the Metropolis, 2 & 3 Vict. c. 71. s. 29, and it was sold by direction of the Commissioner of Police before the twelve months limited by sect. 30 of that Act had expired. Having purchased the tallow from the police: held that *A.* had no property in the tallow entitling him to maintain an action against *C.* for its conversion.

THIS was an action for the conversion of certain goods and chattels of the plaintiff, that is to say a quantity of fat and tallow mixed together: to which the defendants pleaded not guilty, and a traverse of the goods and chattels in the declaration being the

goods and chattels of the plaintiff: on both of which pleas issue was joined.

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On the trial, before *Blackburn J.*, at the *London* Sittings after *Michaelmas* Term, 1861, it appeared that, in the month of *June*, 1861, a severe fire broke out among some wharves and warehouses on the *Surrey* side of the river *Thames* below *London Bridge*. In those warehouses were deposited large quantities of fat and tallow, the property of different persons, which, being melted by the fire, flowed down into the main sewers, and was by them conveyed into the river, from both of which large portions of it were unwarrantably taken by different persons. Among these was one *B.*, a servant in the employ of the Metropolitan Board of Works, who, having obtained some of the tallow, whether from the sewer or river did not appear, sold it to the plaintiff. Early on the morning of the *1st July*, a policeman in one of the streets of the *Metropolis* stopped a cart with the plaintiff and a boy as it conveying this tallow, which the plaintiff, on being questioned, said belonged to one *M.* The policeman took possession of the tallow, and charged the plaintiff and the boy before a magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained, who dismissed the charge, but ordered the tallow to be detained under 2 & 3 *Vict. c. 71. s. 29.*, for regulating the Police Courts in the *Metropolis*. The tallow was accordingly detained, and deposited in a yard with other portions of tallow which had been seized by the police from other persons, until, the whole becoming a nuisance, it was, in the course of a few days, taken away and sold by direction of Sir *Richard Mayne*, the Commissioner of the Police of the *Metropolis*. The defendants were the purchasers of the tallow in question, and, having

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refused to deliver it up to the plaintiff on demand, this action was brought.

On this evidence a verdict was, under the direction of the learned Judge, entered for the defendants, with leave reserved to move to enter a verdict for the plaintiff for 12*l*, the value of the tallow, if the Court should be of opinion that he had a sufficient property in it to maintain the action, it being agreed that the Court should be at liberty to draw any inferences of fact from the evidence that a jury might properly draw.

B. C. Robinson, in *Hilary Term*, 1862, obtained a rule nisi accordingly.

Montagu Chambers and *Barnard* shewed cause.—It is clear that the plaintiff had no property in this tallow, and no title to it except that of possession. But although this is sufficient as against a wrong doer,—*Armory v. Delamirie* (a) and the other cases collected in *Addison on Torts*, 195,—it only holds good until the true owner of the property appears. Here the true owners do appear; for they were either the persons who deposited this tallow in the warehouses, or the Board of Works, in whom, by The Metropolis Local Management Act, 18 & 19 *Vict. c. 120. s. 135.*, the main sewers of the metropolis are vested. But even the possession of the tallow was divested out of the plaintiff and vested in the defendants by the magistrate and the police acting under *stat. 2 & 3 Vict. c. 71.*, for regulating the police courts in the metropolis.

Section 29 enacts, "If any goods or money charged to be stolen or fraudulently obtained shall be in the

(a) 1 *Str.* 505.

custody of any constable by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried and acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof, or in case the owner cannot be ascertained, then to make such order with respect to such goods or money as to such magistrate shall seem meet: Provided always, that no such order shall be any bar to the right of any person or persons to sue the party to whom such goods or money shall be delivered, and to recover such goods or money from him, by action at law, so that such action shall be commenced within six calendar months next after such order shall be made." By act. 30, "When any goods or money charged to be stolen or unlawfully obtained, and of which the owner shall be unknown, shall be ordered by any magistrate to be delivered to the receiver of the metropolitan police force, it shall be lawful for the receiver, after the expiration of twelve calendar months, during which no owner shall have appeared to claim the same, to sell or dispose of such goods or money for the benefit of the superannuation fund of the police of the metropolis."

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B. C. Robinson and Finlason, in support of the rule.—
 The plaintiff had possession of this tallow, and that is

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sufficient title against a wrong doer; *Bridges*, appellant, *Hackescorth*, respondent (a). But the plaintiff here had more than a mere possessory title, and had a right of property, perhaps against all the world, and certainly against every person except the original owner. The finder of property is not guilty of larceny in keeping it when the owner is unknown, *Reg. v. Tharborn* (b). [*Cockburn* C. J. The tallow may have been improperly appropriated by the plaintiff without his being guilty of larceny.] The tallow was abandoned by its owner, and is therefore a derelict, in which case the law vests the property in the person who takes possession of it; 2 *Blackst. Comm.* 9, 14, *Bract.* lib. 1, c. 12, fol. 7 b., lib. 2, c. 1, fol. 9 a., lib. 3, c. 3, fol. 120 a. [*Blackburn* J. That point was not put to the jury, who, most assuredly, would have found against you if it had been. *Cockburn* C. J. Why call this tallow a derelict? If my horse escapes from my field, he does not thereby become a derelict. *Blackburn* J. If this is an abandonment, those persons who have been convicted of stealing goods from wrecks on the coast of *Cornwall* have been improperly treated.] At all events, under the circumstances of this case, the true owner never could be discovered, for the floating mass of tallow was made up of the property of different persons mixed together; *Jones v. Moore*, per Lord *Abinger* C. B. (c), *Blades v. Higgs* (d). [*Blackburn* J. That is immaterial. Suppose the contents of your purse and mine were shaken out on a table and mixed together, would any third person have a right to come and take them? *Crompton* J. The mixing of goods of differ-

(a) 21 *L. J. Q. B.* 75, 15 *Jur.* 1079.

(b) 1 *Den. C. C.* 387.

(c) 4 *Y. & C.* 351, 357.

(d) 12 *C. B. N. S.* 501; aff. on appeal, 13 *C. B. N. S.* 844.

ent persons constantly takes place at fires.] The plaintiff being in possession of the tallow, the defendants, who are wrong doers, cannot defend themselves by setting up a *jus tertii*; *Jeffries v. The Great Western Railway Company* (a). Stat. 2 & 3 *Vict. c. 71.* does not help the defendants, for the sale by the police was illegal, having taken place before the expiration of the twelve months limited by the 30th section. The effect of that illegal sale was to render the police trespassers *ab initio*, *Six Carpenters' Case* (b); and the property in the tallow was thereby reinvested in the plaintiff.

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COCKBURN C. J. This rule must be discharged. It is not necessary to decide whether a person who has possession of a chattel without title may, if the possession be taken from him by a wrong doer, maintain an action against the wrong doer and persons deriving title from him otherwise than in market overt; for the answer to the plaintiff's case is, that the defendants do not derive their title from a wrong doer. It appears to me that this case comes within sect. 29 of stat. 2 & 3 *Vict. c. 71.*, which provides that if property charged to be stolen, or fraudulently obtained, be in the custody of a constable, whether the person charged with stealing or obtaining possession of it be convicted or discharged, the justice may make an order for the delivery of the article which he is charged with having stolen or fraudulently obtained to the rightful owner, if he can be found, and if he cannot, then the justice is to make such order as to him shall seem meet. And the statute apparently contemplates that, within that general power of making an order with respect to detention of the article, the justice may direct it

(a) 5 *E. & B.* 802.(b) 8 *Co.* 146 a.

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to be delivered to the receiver of the Metropolitan Police Force ; for there is a provision in the next section (the 30th) that, when the justice makes an order in that form, the receiver may sell the article at the end of twelve months, if no owner appears to claim it. There is also a provision at the end of sect. 29 that, notwithstanding the order of a justice under that section, an action may be brought within six months to recover possession of the goods against the party to whom they shall have been delivered. Here the plaintiff was in the custody of a policeman on a charge of unlawful possession of this tallow. The justice thought there was not sufficient evidence to convict, but made an order for the detention of the tallow, and (as we are empowered to draw inferences) I assume made an order that it should be delivered to the Receiver of the Police Force; for, otherwise, I cannot suppose that Sir *R. Mayne*, who is a justice of the peace of the metropolis, should have given the direction to sell it. Under these circumstances it appears to me plain that, by virtue of the authority vested in him by the statute, an order was made by the justice, within the scope of his authority and jurisdiction, with respect to dealing with this tallow, and whether the police were or were not warranted in selling it within twelve months is immaterial. The plaintiff, who had nothing but bare naked possession (which would have been sufficient against a wrong doer) had it taken out of him by virtue of this enactment. As against the plaintiff, therefore, the defendant derives title, not from a wrong doer, but from a person selling under authority of the justice, whether rightly or not is of no consequence. I wholly disagree with the doctrine of the plaintiff's counsel, that if the policeman did anything

ultra vires, that would re-vest the possession of this tallow in the plaintiff. He had no title beyond what mere possession gave, and, so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.

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CROMPTON J. I am of the same opinion. It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong doer who takes property from a person having possession of it. It is not clear, however, that the plaintiff, or the person from whom he purchased this tallow, was a finder of it within the principle of *Armory v. Delamirie* (a) and other cases. I think, on the evidence and the inferences to be fairly drawn from it, that he is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas I look on the term finder in those cases to mean an *innocent* finder. This action must be founded on possession; here the possession was divested out of the plaintiff, and he cannot revert to a right of property to re-establish it. I agree with my Lord Chief Justice that where possession is lawfully divested out of a man, and the property is ultimately converted by a person who does not claim through an original wrong doer, the party whose possession was so divested had no property at the time of the conversion. Here, in my mind, the plaintiff's possession was gone. The goods were properly taken from him, and there is no such doctrine as that it will re-invest in him in the manner contended for; otherwise every person who was possessor of goods for any time, however short, might bring

(a) 1 Str. 505.

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an action against any person afterwards found in possession of them, however he may have come by it. That would be pressing too far the doctrine of sufficient title against a wrong doer. But here the plaintiff obtained the goods under circumstances which shew that he knew they came from these burning warehouses. I cannot think that when property of different persons is mixed together, any third person does not commit a crime in taking it—I think he does. Neither is this a derelict—it is, as my brother *Blackburn* says, more like property seized by wreckers; and if I were obliged to draw an inference, I should say that the plaintiff came by it feloniously. I consider that it was the duty of the constable to take the tallow and the plaintiff into the custody of the law, and that even without reference to stat. 2 & 3 *Vict. c. 71*. The defendants here do not claim under the constable, and, supposing they did, the constable did nothing wrong.

BLACKBURN J. I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrong doer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him; and I do not know that it makes any difference whether the goods had been feloniously taken or not. But, assuming that to be the law, the plaintiff has not brought himself within it. It is plain that this tallow flowed down the sewers into the *Thames* from the burning warehouses, and belonged to the owners by whom it had been deposited in them, besides which, the wharfinger had a special property in it. The tallow of the different owners was indeed

mixed up into a molten mass, so that it might be difficult to apportion it among them; but I dissent from the doctrine that, because the property of different persons is confused together, that entitles a third person to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass, but at all events they do not lose their property in it. I also dissent from the notion that there was any evidence here to justify us in saying that this tallow was abandoned or derelict by its owners because it was found floating down the *Thames*. The person who carried it away was not necessarily guilty of felony; still that would be a question for a jury; as it was a question for the justice of the peace, to say if he would commit for the felony or not. But here there can be no doubt that property of the ownership of which was known as this was did not belong to the persons who picked it up. When the property was being carried through the streets of the metropolis at an early hour of the morning by a person who had no right to receive it, I say that, even at the common law, and without resorting to the Metropolitan Police Acts at all, the constable was justified in taking it into his possession, and bringing him before a justice of the peace; and the law is so laid down in *Lawrence v. Hedderley* (a). I draw the inference of fact that the justice was satisfied that this tallow had come from the warehouses, and I hold that, as matter of law, the police were bound to keep it for the true owner, because they had ascertained that there was a true owner, and who he was. Their possession was the possession of the true owner and not of the wrong doer, whose possession was ter-

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(a) 3 Taunt. 14.

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minated by their taking possession. It is therefore not necessary to consider whether the sale of the tallow to the defendants by the police was right or wrong. If wrong, the true owner may complain against them; if not, no one else can, but at all events, not the plaintiff, who was himself a wrong doer.

Rule discharged.

Saturday,
January 31st.

ROSSANNA DUPIN FRAY *against* Sir COLIN
BLACKBURN, Knight.

Judge.
Action.
Malice.

An action does not lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly.

THE declaration stated that heretofore, to wit on the 28th *January*, 1862, the defendant, then being one of the Judges of Her Majesty's Court of Queen's Bench, at *Westminster*, and the plaintiff then being the plaintiff in a certain action depending in the same Court, in which one *Henry Edmund Voules* was defendant, and certain costs of adjournment of the trial of the same cause being due to the plaintiff from the last named defendant, and the plaintiff having theretofore, to wit, on the 15th *January*, obtained a rule nisi of the same Court against the said *Henry Edmund Voules* for the payment of such costs, which rule came on to be argued before the said defendant hereto as such Judge on the said 28th *January*, when no sufficient cause was shewn against making the same absolute: Yet the defendant so being such Judge, well knowing the premises and not regarding his duty in that behalf, did refuse to make such rule absolute, and, on the contrary

thereof, did discharge the same rule with costs, contrary to law: by means of which premises the plaintiff not only has not recovered the said costs so due to her, and amounting, to wit, to the sum of 20*l.*, but she is liable to pay the costs so then ordered by the defendant to be paid by her, amounting, to wit, to 10*l.*, and the plaintiff has necessarily incurred divers costs and expenses, amounting, to wit, to 20*l.*, in and about legal resistance to the last mentioned order; and the plaintiff has sustained other wrongs and injuries thereby: and the plaintiff claims 50*l.*

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Demurrer, and joinder therein.

The points set down to be argued on behalf of the defendant were: First. That no action lies against a Judge of one of the superior Courts for anything done by him in his judicial capacity, and that it appears by the declaration that the act complained of was so done. Secondly. That the declaration was bad for not alleging malice. Thirdly. That it was defective for not alleging want of reasonable and probable cause.

The case came on for argument on *Jan. 27.*

Honyman, who appeared in support of the demurrer, was not called upon.

The plaintiff in person, *contra*, contended that the omission to allege malice, was only a ground of special demurrer, and cited stat. 11 & 12 *Vict. c. 44.* and *The Mirrour of Justices.*

Honyman was not called upon to reply.

PER CURIAM. (COCKBURN C. J., WIGHTMAN, CROMPTON and MELLOR JJ.)

Judgment for the defendant.

Jan. 31st. The plaintiff in person applied for leave to

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amend by introducing an allegation of malice and corruption. [*Crompton J.* It is a principle of our law that no action will lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions. In the present case, there can be no doubt that the action is most improper and vexatious.]

Per CURIAM. (CROMPTON and MELLOR JJ.)

Leave to amend refused (a).

(a) That a Judge cannot be questioned in a civil action for any act done by him in his judicial capacity has been settled by numerous dicta and decisions from *Floyd v. Barker* (12 Co. 23, 24, 25), down to *Kemp v. Neville* (10 C. B. N. S. 523.)

Upon the question whether the action would have been maintainable if the declaration had contained an allegation of malice and corruption, *Honyman* was prepared to cite the following cases: *Floyd v. Barker* (12 Co. 23, 24, 25); *Barnardiston v. Soame* (6 How. St. Tr. 1063. 1096); *Dr. Groenvelt v. Dr. Burwell* (1 Ld. Raym. 454. 468); *Taaffe v. Downes* (note to *Calder v. Halket*, 3 Moo. P. C. C. 36; see pp. 51. 58. 60); *Calder v. Halket* (3 Moo. P. C. C. 28); *Miller v. Hope*, 2 Shaw. App. Ca. 125; see pp. 132. 135. 138. 143. 145.; *Gelen v. Hall* (2 H. & N. 379); *Gates v. Lansing* (5 Johns. U. S. 282. 290—292. 295; affirmed in the Court of Errors, 9 Johns. U. S. 395, see pp. 424. 432); *Pratt v. Gardner* (2 Cushing (Massachusetts) 63; see pp. 69, 70).

This question was agitated in the recent case of *Thomas v. Churton* (2 B. & S. 475), where it was held by Cockburn C. J., *Crompton and Blackburn JJ.*, that a coroner holding an inquest on a dead body is not liable to an action for words falsely and maliciously spoken by him in his address to the jury: Cockburn C. J. however added, p. 479, "I am reluctant to decide, and will not do so until the question comes before me, that if a Judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action."

END OF HILARY TERM.

HILARY VACATION, 26 VICT.

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HEBDON *against* WEST, one of the Directors of
THE INTERNATIONAL LIFE ASSURANCE SOCIETY.

Tuesday,
February 13th.

Life insurance.
14 G. 3. c. 48.

In 1855, the plaintiff having been for twenty years clerk in a bank of which *P.* was the managing partner, his salary was increased from 200*l.* to 600*l.* a year, and was to continue at that amount for seven years. Before this the plaintiff had received advances from the bank to the amount of 4700*l.* *P.* had told him that, during his (*Pedder's*) life, he should never be called upon for the money; and in 1856, he being desirous to secure himself, in the event of *P.'s* death, with his permission insured his life, with a certain Insurance Company, for 5000*l.*; and in 1857, his debt having increased to 6000*l.*, he, with the consent of *P.*, effected a further policy of insurance for 2500*l.* in another Insurance Company. *P.* died on the 21st *March*, 1861: the bank stopped payment in the same year, and inspectors were appointed, to whom the plaintiff paid the 5000*l.* which he received on the first policy. In an action on the second policy, held,

as. l. 3.
Insurable
interest.
Insurance in
two offices.
Payment by
one.

1. That the plaintiff had not an insurable interest in the life of *P.*, within stat. 14 G. 3. c. 48. *s. 1.*, by reason of the bare promise of *P.* that he would not, during his life, enforce payment of the debt due to the bank from the plaintiff.

2. That the plaintiff had an insurable interest in the life of *P.*, within that statute, arising from the engagement by *P.* to employ him for seven years at a salary of 600*l.* a year, to the extent of as much of the period of seven years as remained at the time the policy was effected.

3. That the payment of 5000*l.* on the first policy was a bar to the plaintiff's claim by virtue of stat. 14 G. 3. c. 48. *s. 3.*

THIS was an action against the defendant, one of the directors of *The International Life Assurance Society.*

The declaration set out a policy, dated the 7th *May*, 1857, by which the plaintiff effected an assurance with the Society, in the sum of 2500*l.*, upon the life of *Edward Pedder*, of *Preston, Lancashire*, banker, containing a declaration that the plaintiff had an interest in the

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life of *Edward Pedder* to the full amount of such assurance, and thereby agreeing that the said declaration, together with the proposal therein referred to, should be the basis of the contract between the assured and the Society; and a proviso that, in case any fraudulent or untrue allegation were contained in the recited declaration, or in the proposal therein referred to, or in any of the testimonials or documents addressed to or deposited with the Society in relation to the said assurance, then the policy should be void, and all moneys paid thereunder should be forfeited to the Society. The declaration also set out the conditions, restrictions and stipulations indorsed on the policy; and then alleged that *Edward Pedder* died after the making of the policy and whilst the same was in force, and that payment had been made of the premiums to keep the policy in force at the time of the death of *Edward Pedder*, and thereupon the sum of 2500*l.* became payable to the plaintiff. Averment that all conditions had been observed, &c.; yet the sum of 2500*l.* had not been paid.

There were also counts for money received, for interest and on accounts stated.

First plea to the first count. That the plaintiff was not interested in the life of *Edward Pedder*.

Issue thereon.

Second plea to the first count, being a plea to the further maintenance of the action. That before the time of the making of the policy of insurance in that count mentioned, the plaintiff had effected an insurance and procured a policy of insurance upon the life of *Edward Pedder* with and from a certain insurance Society other than the defendant's Society, to wit *The City of Glasgow Life Insurance Company*, for a large sum of money, to

wit 5000*l.*, which amount so insured by and with the said other Society, as in this plea mentioned, equalled the amount of interest which the plaintiff ever had in the life of *Edward Pedder*, and that the last mentioned policy was and continued in force at the time of the making of the policy in the first count mentioned, and until and at the time of the death of *Edward Pedder*: and that, after such death, and after this suit, and before the time of pleading this plea, the plaintiff recovered and received from the other Society, being the insurers on the said policy in this plea mentioned, the said sum of 5000*l.* thereby insured: and the plaintiff hath already recovered and received a sum of money equal to the amount and value of the interest of the plaintiff in the life of the said *Edward Pedder* from the insurers to him upon the said life.

Demurrer, and joinder therein.

Third plea, to the indebitatus counts: Never indebted.

Issue thereon.

On the trial, before *Crompton J.*, at the Winter Assizes holden at *Liverpool* in 1861, it appeared that the plaintiff had been for twenty years clerk in a bank at *Preston*, of which *Edward Pedder* was the senior and managing partner. In 1855 there was an intention to make the plaintiff a partner; but that was not carried out, and instead thereof his salary was increased from 200*l.* a year to 600*l.*, and it was to continue at that amount for seven years: he was also employed by *Pedder* as his agent in collecting rents, for which he received a commission of 16*l.* a year; but there was no contract to continue him in that employment. Before this period the plaintiff had been engaged in unsuccessful speculations, and had been assisted by advances from the bank

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to the amount of about 4700*l*. In the course of conversations between the plaintiff and *Pedder* upon the subject of this debt, *Pedder* had told the plaintiff that, during his (*Pedder's*) life, he should never be called upon for the money: and the plaintiff, being desirous to secure himself in the event of *Pedder's* death, requested and obtained his permission to insure his life to provide against this debt. Accordingly, the plaintiff effected an insurance with *The City of Glasgow Life Insurance Company*, dated the 4th April, 1856, on the life of *Pedder*, for 5000*l*. At the end of twelve months from this time, the plaintiff's debt to the bank having increased to 6000*l*., he obtained the consent of *Pedder* to his effecting another insurance upon his life; and on the 7th May, 1857, he effected the policy upon which this action was brought. *Pedder* died on the 21st March, 1861; and the bank stopped payment in the same year. The plaintiff paid the sum of 5000*l*. which he received from *The City of Glasgow Life Insurance Company* to the inspectors appointed for winding up the affairs of the bank.

A verdict was entered for the plaintiff for 2500*l*. and interest, leave being reserved to move to enter a nonsuit, or a verdict for the defendant on the first and second pleas, or to reduce the damages.

In *Hilary* Term, 1862,

Kemplay obtained a rule nisi accordingly, on the grounds: That the plaintiff had no interest in the life of *Pedder*, within the meaning of stat. 14 *G. 3. c. 48*. Second. That the plaintiff was not interested in *Pedder's* life to the full amount of the insurance, within the meaning of the policy. Third. That the second plea was proved. Fourth. That the plaintiff's interest in *Pedder's* life was less than the sum insured, and the

amount of the verdict for the plaintiff ought to be reduced accordingly. And the Court ordered that the demurrer should come on for argument with the rule.

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The case was argued in this Term (*Jan.* 14th), before WIGHTMAN, CROMPTON and MELLOR, JJ. The arguments on the demurrer to the second plea and the third ground of the rule sufficiently appear from the judgment of the Court.

T. Jones (Northern Circuit), *Edward Jones* with him, for the plaintiff.—First. The plaintiff had an insurable interest in the life of *Pedder*, and therefore this policy was not within stat. 14 *G.* 3. c. 48. s. 1., which enacts, “that no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering.” In *Halford v. Kymer* (a), indeed, where a policy effected by a father on the life of his son, he not having any pecuniary interest therein, was held void, Lord *Tenterden* said, p. 728, that the word interest in this statute meant pecuniary interest. But one person may have a pecuniary interest in the prolongation of the life of another. Could not a husband effect an insurance on the life of his wife? [*Wightman, J.*—The husband is bound to find his wife necessaries.] The loss which the different members of a family sustain by the death of one of them, is estimated in money when an action is brought under Lord *Campbell’s* Act, 9 & 10 *Vict.* c. 93.; *Blake v. The Midland Railway Company* (b), *Pym v. The Great Northern Railway Company* (c). In the latter

(a) 10 *B.* & *C.* 724.(b) 18 *Q. B.* 93.(c) 2 *B.* & *S.* 759.

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case *Cockburn* C. J., delivering the judgment of the Court (p. 768), said—"As it has been established by the cases decided upon this statute, that, if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action, it is for a jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action." [*Crompton* J.—The cases decided on Lord *Campbell's* Act have little analogy to the present.]

The first ground of insurable interest which the plaintiff had in the life of *Pedder* is the honorary engagement made by him that the plaintiff during his life should not be called on for payment of the debt owing to the bank. [*Wightman* J. Suppose *Pedder* had, notwithstanding, enforced payment of the debt.] If the policy is valid at the time it is entered into, an alteration of circumstances afterwards, by which the interest of the assured ceases, does not invalidate it; *Dalby v. The India and London Life Assurance Company* (a), in the Exchequer Chamber, overruling *Godsall v. Boldero* (b). [*Crompton* J. Some learned remarks of Professor *De Morgan*, in his *Essay on Probabilities*, are cited by the reporter in a note at the end of that case, p. 393. *Wightman* J. This interest in the life of *Pedder* is only an expectation that he would not call for the debt owing to the bank. *Crompton* J. Or the possibility of his forbearing to do so. *Mellor* J. This is an attempt to insure the chance of *Pedder* not doing what

(a) 15 C. B. 365.

(b) 9 East, 72.

he might do the day after the engagement was made. *Wightman J.* How could the pecuniary interest in such a contingency be estimated? It is as capable of being estimated by an actuary as the interest in the case of an insurance Company, which, having insured a life, apprehends that it has taken upon itself too great a risk, and reinsures in another office; in that case the liability to pay the sum, for which the insurance was effected, when the life ends is insured. The plaintiff had an interest in providing against the extinction of a reasonable expectation of pecuniary advantage to himself so long as *Pedder* lived, and it would not be impossible for a jury to estimate it in money, though it might not be easy to direct them as to the manner of doing it. They would have to say whether there was a reasonable expectation of *Pedder's* engagement being kept by him. Suppose *Pedder* had insured his own life for the benefit of the plaintiff, and received the funds to pay the premiums on the plaintiff, the policy would have stood. [*Crompton J.* That question was left undecided in *Wainwright v. Bland*(a).] In that case the policy was avoided by the representations.

The plaintiff had a further insurable interest in the life of *Pedder*, from the agreement of the bank to pay him a sum of 600*l.* for seven years, though, it being one not to be performed within one year, and not in writing, it could not have been enforced at law by reason of the Statute of Frauds, 29 *Car. 2. c. 3. s. 4.* In *Waters v. Towers*(b), which was an action for a breach of contract in not completing certain works, whereby the plaintiffs were prevented from fulfilling a contract made by them with another firm, the plaintiffs were held entitled to recover

(a) 1 *M. & W.* 32.(b) 8 *Exch.* 401.

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as special damage the loss of profit on their contract, although not being in writing it could not be enforced at law; *Alderson B.* said, p. 403, "If a person undertakes to make a certain article for another, and to deliver it to him on a particular day, but fails to do so until a year afterwards, it would be most unreasonable that the latter should not recover any damage because the contract was not in writing. The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, 'We should have made such and such a contract if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract." [*Mellish*, contra, said that it was not intended to rely on the objection that the agreement, not being in writing, was void by the Statute of Frauds.] Then the question is, whether a clerk or other person, engaged to serve for a term of years, may not insure the life of his master: he has an annuity for his master's life, which is an insurable interest. At the time the policy in question was effected the plaintiff had an interest in the life of *Pedder* to the extent of his own salary for the unexpired period of about five years. It makes no difference how far the damage arising from the death of the life insured is reduced after the making of the policy; *Dalby v. The India and London Life Assurance Company*, in error (a).

The second ground of the rule, that there was an untrue declaration in the policy as to the amount of the plaintiff's interest, is not raised by the pleadings. But the policy

(a) 15 C. B. 365.

s not avoided by such a declaration, there being no moral delinquency in the party making it. [*Mellish*, contra, said that it was not intended to rely on that point.]

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The fourth ground of the rule is the same as the second. The plaintiff had an interest in the life of *Pedder*, in respect of his salary, for the remainder of the period of seven years.

Mellish (*Kemplay* with him), for the defendant.—The principal question is whether the plaintiff had an insurable interest in the life of *Pedder*, either in respect of 1000*l.* part of the debt due from him to the bank, or in respect of his salary as clerk to the bank for five years. As to the interest depending on the debt, it cannot be maintained that every debtor has an interest in the life of his creditor. The cases decided upon stat. 9 & 10 Vict. c. 93. do not lay down a principle applicable to cases under stat. 14 G. 3. c. 48., the words of which are different. [*Wightman J.* We are all agreed that there is no analogy between the two statutes.] Stat. 14 G. 3. c. 48. must mean that no insurance shall be made by any person or persons on the life of any *other* person or persons wherein the person insuring shall have no interest; and that interest must be a legal interest as distinguished from an expectation. It is no objection that a contract in which the person effecting the insurance is interested cannot be sued upon legally, but that the engagement not to call for the debt of the plaintiff was merely a moral one. As to the interest arising from the salary, the precise language of sect. 1 requires, and sect. 3 assumes, that the interest should be certain and of a particular amount. Further, the

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contract was not dependent on *Pedder's* life, but was for seven years. [*Crompton J.* It might happen that *Pedder*, one of the joint contractors, was the only one who could pay the salary, or the plaintiff might be interested in all the joint contractors being alive.] If the salary accruing to the plaintiff was an insurable interest, how is the value of such an interest at the time the policy was effected to be ascertained? It involves an inquiry into the stability of the firm; and nothing would be due except for services rendered. [*Mellor J.* It is a very common thing for a clerk to insure the life of his master.] He has no insurable interest in it unless he receives an annuity during the life of his master. The person insuring must be in the position of a creditor, though the debt may be debitum in presenti solvendum in futuro. The Judge should be able to tell the jury what the value of the employment was at the time of making the policy.

Further, if the plaintiff had an insurable interest in the life of *Pedder*, it did not exceed one year's salary, and therefore, the damages should be reduced to that amount.

T. Jones, in reply.

Cur. adv. vult.

WIGHTMAN J. (*Feb.* 13th) delivered the judgment of the Court.

There are two questions in this case. The first, is, whether *Hebdon* had any insurable interest at all in the life of *Pedder*; and the second, whether, assuming that he had an insurable interest, the payment of the 5000*l.* by *The Glasgow Life Insurance Company*, as stated in the second plea, is an answer to the plaintiff's claim.

With respect to the insurable interest of the plaintiff,

it was determined, in the case of *Halford v. Kymer* (a), that, unless the insured have a *pecuniary* interest in the life insured, the policy is void by the 14 G. 3. c. 48. s. 1. In the present case it was contended for the plaintiff that he had two kinds of insurable interest in the life of *Pedder*,—one, on the ground of a promise that *Pedder* had made to him that he (*Pedder*) would not enforce the payment of any debt that the plaintiff might owe him during his (*Pedder's*) lifetime, and the other, on the ground that the plaintiff was in the employ of *Pedder* at a salary of 600*l.* a year, under an agreement that the engagement should last for seven years. We do not think that the first kind of interest in the life of *Pedder*, namely that he had said that he would not enforce payment of debts due to him from the plaintiff during his (*Pedder's*) life, without any consideration or any circumstance to make such a promise in any way binding, can be considered as a pecuniary or indeed an appreciable interest in the life of *Pedder*. The other kind of interest, namely that which arises from the engagement by *Pedder* to employ the plaintiff for seven years at a salary of 600*l.* a year, may, we think, be considered as a pecuniary interest in the life of *Pedder*, to the extent at least of as much of the period of seven years as would remain at the time the policy was effected, which appears to have been about five years. This, at the rate of 600*l.* per annum, would give the plaintiff a pecuniary interest in the life of *Pedder* to the amount of 3000*l.* which would be sufficient to sustain the present policy, which is for 2500*l.* only.

We assume, then, that the plaintiff had a pecuniary interest in the life of *Pedder* to the extent of 2500*l.* at the time he effected the policy with the defendant's office.

(a) 10 B. & C. 724.

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If that be so, the question then arises whether payment, after the death of *Pedder*, of 5000*l.* by another life insurance Company, with whom the plaintiff had also insured *Pedder's* life to that amount, is a bar to the plaintiff's claim by virtue of the 3d section of the 14 *G. 3. c. 48*, it being taken as a fact that the 5000*l.* included all the insurable interest that the plaintiff had at the time of making both policies;—in fact that the interest of the plaintiff at the time of making the insurance with the defendant was the same as that which he had when he made the insurance with the other Company.

It was contended for the defendant that, admitting that the plaintiff had an insurable interest in the life of *Pedder* to the extent of 5000*l.* at the times when both the policies were effected, the payment of the 5000*l.* by the *Glasgow* Company was a bar to the recovery by the plaintiff upon the policy effected with the defendant, by the terms of the 3d section of the before mentioned statute, which provides that "no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured" in the life which is the subject of the insurance; and that, as all the pecuniary interest of the plaintiff in the life of *Pedder* was recovered from the *Glasgow* Company, he was not entitled to recover from another set of insurers the amount of interest which was included in the insurance with them. It was said that, if this were otherwise, the object of the statute would be defeated, as a small amount of insurable interest might be made the foundation for a great number of insurances, each to the amount of the whole of the interest of the insured; and, if he could recover upon each of these, it would be against the words of the 3d section of the statute.

which are, that the insured shall only recover from the insurer or *insurers* the amount of his interest, meaning that, whether there is one or many insurers, he can only recover from all or any the amount or value of his interest.

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This raises a question which does not appear to have come under the consideration of the Courts in any of the cases which were cited, and seems to depend upon the meaning of the legislature in the use of the words "insurer or insurers" in the 3d section of the Act. It was said that, in the use of the word "insurers" in the plural as well as the word "insurer" in the singular, the legislature may have intended that, whether there were many insurances or only one, the person insuring should only receive the amount of his interest in the life insured ; on the other hand it is said by the plaintiff that in the use of the word "insurers" the legislature must be understood to have contemplated the case of several persons being insurers in one policy, and intended that the insured should receive no more upon any policy or policies, whether granted by one or more, than the amount of his insurable interest.

Looking to the declared object of the legislature, we

are of opinion that though, upon a life policy, the insured interest at the time of the making the policy, and the interest at the time of the death, is to be considered, it was intended by the 3d section of the Act that the insured should in no case recover or receive from the insurers (whether upon one policy or many) more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons and

terms of the 3d section of the statute from
or receiving any more from the others. Any
arising from the supposed hardship of allowin
surers in such a case to receive and retain the
without being obliged to pay the consideration
such premiums were paid, would be equally app
the case of marine insurances, upon which,
many policies there may be, the underwriters
liable to the extent of the value insured.

We are, therefore, of opinion that the secon
good, and that it was proved upon the trial,
the defendant is entitled to judgment upon the
and also to have the verdict entered for him
second plea.

Rule absolute to enter the v
the defendant on the sec

Judgment on the demurre
defendant.

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The Overseers of WILLESDEN, appellants, The
Overseers of PADDINGTON, respondents.

Friday,
February 13th.

Settlement.
Renting a
tenement.
6 G. 4. c. 57.
s. 2.

By agreement, dated *December 2d*, 1859, a cottage was let by *A.* to *B.* for three months from the *25th December*, 1859, at the yearly rent of 18*l.*, the first monthly payment to be made on the *25th January*, 1860; three months' notice from either party to the other to be a sufficient notice to quit. *B.* having occupied the cottage for eighteen months under this agreement: Held that he gained a settlement by renting a tenement for one whole year, within stat. 6 G. 4. c. 57. s. 2.

SPECIAL case stated by consent under stat. 12 & 13
Vict. c. 45. s. 11.

An order had been made by two justices for the removal of *Joseph Whurr*, widower, and his six lawful children, from the parish of *Paddington* to the parish of *Willesden*, both in the county of *Middlesex*, and due notice of appeal against the order had been given.

Joseph Whurr, the pauper, on the *2d December*, 1859, entered into the following agreement in writing:—"Agreement made this *2d day of December*, 1859, between *John Hunter*, Esq., *George Mayer*, Esq., and *Maria Cramer*, widow, executors to the late *George Mayer*, Esq., of the one part, and *Joseph Whurr*, foreman to Mr. *Quarterman*, on the other. The said *John Hunter*, Esq., and others aforesaid, agree to let and the said *Joseph Whurr* agrees to take the four roomed cottage next to Mr. *Higgs*, at *Willesden*, for three months from *December 25th*, 1859, at the yearly rent of 18*l.*, the first monthly payment to be made the *25th January*, 1860, free from all taxes and assessments and water rates, which are to be paid by the tenant, and allowed to him out of the rent:

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and it is hereby agreed that three months' notice from either party to the other shall be a sufficient notice to quit; and the said *Joseph Whurr* agrees upon receiving such notice to give up quiet possession of the said cottage to the said *John Hunter, Esq.*, and others as aforesaid.

(Signed) "*Joseph Whurr.*"

"Witness *Alex. Todd.*"

Joseph Whurr occupied the cottage under the agreement for about eighteen months, from the 25th December, 1859, and paid some of the rates in respect of the same; and it was conceded that he gained a settlement in *Willesden*, by the payment of rates and by residing there, if he bonâ fide rented such cottage "for the term of one whole year," under stat. 6 G. 4. c. 57. s. 2.

The question for the opinion of the Court was, whether, under the terms of the agreement, *Joseph Whurr* rented the cottage for the term of one whole year, so as thereby to gain a settlement in the parish of *Willesden*.

If the Court should answer the question in the affirmative, the order of removal was to be confirmed; if in the negative, the order was to be quashed.

Metcalfe, for the respondents.—The agreement operated as a demise for three months certain, and afterwards for an indefinite period; so that, after the expiration of the first three months, it became a yearly tenancy determinable by three months' notice. (He was then stopped.)

Underdown, for the appellants.—The tenancy under the agreement was for six months at least, and afterwards from three months to three months; therefore the presumption that a holding for an indefinite period must be understood to be a yearly holding does not arise: other-

ise if a person took lodgings for one week under an agreement such as this, and continued in them after the first week, he would become a yearly tenant. In *Reg v. The Inhabitants of Chawton* (a) the words of the agreement were "for the term of six months from &c., and so on, or six months to six months, until one of the said parties shall give to the other of them six calendar months' notice, &c." and that was held to be a taking for a year. But here the tenancy, being determinable at the end of any three months, is inconsistent with a yearly tenancy. In *Rex v. The Inhabitants of Hurstmonceaux* (b), where a house was occupied under an agreement at a yearly rent of twenty guineas to be paid weekly, and either party to be at liberty to determine the tenancy by three months' notice from any quarter day, the pauper was held to gain a settlement, because, as *Bayley J.*, in delivering the judgment of the Court, p. 556, said, "he occupied the house for a whole year, and paid the rent, which exceeded 10*l.* during the same period." [*Wightman J.* After the pauper had held for four months, might not the holding be determined at the end of three months from that time?] The notice must expire at the end of three months from the end of the former taking of three months. [*Wightman J.* The rent being yearly raises a *prima facie* presumption of a yearly tenancy. In *Birch v. Wright* (c), cited in the judgment in *Rex v. The Inhabitants of Hurstmonceaux* (d), *Buller J.* said, "If a tenant from year to year hold for four or five years, either he or his landlord at the expiration of that time may declare on the demise as having been

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(a) 1 Q. B. 247.

(b) 7 B. & C. 551.

(c) 1 T. R. 378. 380.

(d) 7 B. & C. 551. 556.

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made for such a number of years," and *Bayley J.*, delivering the judgment of the Court in the latter case, adds, "On the like principle, in this case the taking by the pauper is to be considered a lease for one whole year in its creation, although an event might happen by which the original interest so created in the first instance would be changed." In *Birch v. Wright* there was a tenancy from year to year. [*Crompton J.* A holding from three months to three months is so unusual that a yearly holding would rather be presumed, if the words are consistent with it.] In the present case the holding is in the first instance distinctly created for three months. A yearly rent is named for the sake of convenience, and not with the intention of fixing the period of the tenancy.

Metcalf was not called upon to reply.

WIGHTMAN J. In these cases everything depends upon the particular words in the agreement; and it is difficult to find an authority to guide us in construing it. We must endeavour to ascertain the reasonable intention of the parties looking at the whole of the document. I think that here the intention was, that there should be a demise for three months certain from the 25th *December*, 1859, but that, if the parties should go on as landlord and tenant after that time, then it should be a yearly tenancy at the rate of 18*l.* a year payable monthly, and determinable by giving three months' notice, which I think may be given at any time, and need not be a notice expiring at any particular part of the year. Then, the pauper having occupied for more

than a year, he has rented a tenement for the term of one whole year within the meaning of stat. 6 G. 4. c. 57. s. 2., and therefore gained a settlement in the appellant parish.

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CROMPTON J. It is difficult to make out what the parties intended by this informal agreement. But the only question here is whether the pauper, having continued in occupation for eighteen months, held under an agreement for a yearly tenancy. In *Doe d. Pitcher v. Donovan* (a) *Chambre J.* said: "If it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year: but if it were a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time." That, however, was said in a case where the Court had to determine, not whether there was a yearly tenancy, but at what time the notice to quit should be given. Then what would be the holding under *this* agreement, if there were no provision about notice? Although the agreement is dated the 2d *December*, the tenancy is to commence at the usual time and is at a yearly rent, how payable does not matter; though that it is payable monthly is rather against the contention of the appellants, because if the tenancy was to be from three months to three months the rent would probably have been so payable. It was suggested that there was a tenancy for six months certain, and afterwards from three months to three months, but that is an unusual tenancy, and I do not see how, on that supposition, the notice would operate. The latter part of the agreement assumes that after the three months the holding will be such as to require a notice to quit: then, the period of holding being left uncer-

(a) 1 *Taunt.* 555. 557.

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tain, the law presumes a yearly holding. My impression, though not without doubt, is that after the expiration of the first three months this was a holding for a year, with liberty to put an end to it upon giving three months' notice.

MELLOR J. I think Mr. *Metcalf* stated truly what was probably the intention of the parties to this agreement, viz., that there should be a tenancy for three months on trial, and, if it continued beyond that, it should be a yearly tenancy determinable by a three months' notice; and the governing circumstances leading to this conclusion are that there was to be a yearly rent and a notice, which would not have been required if the tenancy was from three months to three months.

Order of removal confirmed.

Friday,
February 13th.

BUDGE, appellant, PARSONS, respondent.

SAME, appellant, SAME, respondent.

These two cases are reported, ante, pp. 379, 382.

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e Overseers of SALFORD, appellants, The Overseers of MANCHESTER, respondents.

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stat. 24 & 25 *Vict. c. 55.*, passed on 1st *August*, 1861, by sect. 1 enacts, that after the 25th *March* next the period of three years shall be substituted for that of five years specified in sect. 1 of "stat. 9 & 10 *Vict. 3.*", "and the residence of a person in any part of a union shall have same effect in reference to the provisions of the said section as a licence in any parish." On the 12th *March*, 1862, a township coming in a union obtained an order for the removal of a pauper who resided in the union for three years next before the application for order: the order was executed, and there was no appeal. Held that, removal being illegal, the removing township could not recover, under 4 & 5 *W. 4. c. 76. s. 84.*, the expense of maintaining the pauper from the time of sending notice of chargeability to the time of removal.

Pauper.
Order of
removal.
*Stat. 24 & 25
Vict. c. 55. s. 1.
Expense of
maintenance.*

ASE stated under stat. 20 & 21 *Vict. c. 43. s. 2.*

At a Petty Session for the borough of *Salford*, held before *Henry Leigh Trafford*, Esq., stipendiary magistrate for the division of *Manchester*, an information and complaint was preferred by the overseers of the township of *Salford* against the overseers of the township of *Manchester*, under stat. 4 & 5 *W. 4. c. 76. s. 84.*, alleging that, by an order of two justices for the borough of *Salford*, bearing date the 12th *March*, 1862, *Charles Chley* and *Rachel* his wife, and their child *Emma*, then lawfully chargeable to the township of *Salford*, were ordered to be removed from the township of *Salford* to the township of *Manchester*, in the county of *Lancaster*, as the place of their last legal settlement, which order of removal had since been carried into execution, and the sum of 2*l.* 6*s.* 8*d.* for the maintenance of the paupers was duly demanded from the overseers of the township of *Manchester* on the 28th *June* last, but which was then refused, and still was neglected to be paid, and

1863. that no notice of appeal had been given against the order.
Overseers of
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v.
Overseers of
MANCHESTER. The magistrate dismissed the information and complaint.

The order of removal, dated the 12th *March*, 1862, had been duly obtained and executed, and there was no appeal. And the appellants had incurred the sum of 2*l.* 6*s.* 8*d.* for the maintenance of the paupers from the time of their having sent a notice of the chargeability of the paupers to the respondents to the time of the removal, which sum had been duly demanded from the respondents, and they had neglected and refused to pay the same.

It was admitted, on the part of the respondents, that the settlement of the paupers was in their township of *Manchester*, and that the order of removal was lawfully made; but it was contended by them that they were not liable to pay the said sum, inasmuch as the removal of the paupers was an illegal act by reason of stat. 24 & 25 *Vict. c.* 55. having subsequently come into operation, and the paupers having resided for three years next before the application for the order of removal in the *Salford* Poor Law Union, in which union the township of *Salford* is situate, and thereby having gained a status of irremovability in *Salford* by virtue of sect. 1 of stat. 24 & 25 *Vict. c.* 55., which enacts, "That after the 25th day of *March* next" (*i.e.* 1862) "the period of three years shall be substituted for that of five years specified in the first section of" stat. 9 & 10 *Vict. c.* 66., "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish."

It was admitted by the appellants that the paupers

had resided within the limits of the *Salford* Poor Law Union for the term of three years and upwards prior to the granting of the order of removal: but they contended that the 1st section of stat. 24 & 25 *Vict. c. 55.* had a prospective operation only, and that a status of irremovability could not be obtained, under that section, unless the whole or part of the three years' residence in a union was subsequent to the 25th *March*, 1862, and therefore that a prior residence in the union was not within the Act in question, and that they were entitled to be repaid the sum in question.

The magistrate, being of opinion that the 1st section of stat. 24 & 25 *Vict. c. 55.* had precisely the same operation as the 1st section of stat. 9 & 10 *Vict. c. 66.*, gave his determination against the appellants, on the grounds, firstly, that the Act in question had a retrospective effect; secondly, that the order of removal was, in fact, rendered void by the operation of the statute; and, thirdly, that the respondents were not liable to pay the amount claimed for the maintenance of the paupers; and he stated the question for the opinion of this Court to be, whether the 1st section of stat. 24 & 25 *Vict. c. 55.* has a retrospective or merely a prospective operation; if the former, then the judgment was to stand for the respondents; if the latter, then the judgment was to be entered for the appellants.

Welsby, for the appellants.—The enactment in stat. 24 & 25 *Vict. c. 55.*, passed on the 1st *August*, 1861, which came into operation on the 25th *March*, 1862, only affects orders of removal made after that day; and acts done antecedently, except only the removal of a pauper, are not avoided by it. The order of removal made under stat. 9 & 10 *Vict. c. 66.* was good when it was

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 Manchester.

made, and the intervention of stat. 24 & 25 Vict. c. 55. does not make it inoperative, except as to the removal of the paupers.

Monk, contra.—The question is not that stated in the case: but whether the magistrate would have been justified in making an order for 2l. 6s. for the maintenance of the paupers. Stat. 9 & 10 Vict. c. 66. forbids the removal of a pauper after the passing of that Act, as well as the granting of an order for his removal, when he has resided in the parish for five years; and the effect of stat. 24 & 25 Vict. c. 55. s. 1. is to substitute the period of three years for five years in the former statute. In *Reg. v. The Inhabitants of St. Mary, Whitechapel* (a) it was held that the removal of a widow within twelve months after the death of her husband after stat. 9 & 10 Vict. c. 66. s. 2. was illegal and a good ground of appeal, although the order of removal, having been made before the passing of the statute, was valid. The order of removal still remains valid as evidence of the settlement; but the pauper cannot be removed under it; *Reg. v. The Inhabitants of Glossop* (b); and the expense of the maintenance must be borne by the union in which the pauper had gained a status of irremovability. By stat. 11 & 12 Vict. c. 110. s. 3., all costs incurred in the relief of paupers irremovable by virtue of stat. 9 & 10 Vict. c. 66. are charged upon the common fund of the union in which the parish is comprised. [*Wightman J. Reg. v. The Inhabitants of St. Mary, Whitechapel* (a), is in point.] [He was then stopped.]

Welsby, in reply.—In *Reg. v. St. Mary, Whitechapel* (a),

(a) 12 Q. B. 120.

(b) 12 Q. B. 117.

the question being whether the pauper was irremovable, the statute necessarily acted retrospectively. The question here is whether a parish, which has obtained a lawful order of removal, ought to pay the costs of maintaining the pauper from the time of sending notice of chargeability to the time of removal. [*Mellor J.* The liability to pay those costs must follow the power to remove.] They were incurred before stat. 24 & 25 *Vict. c. 55. s. 1.* came into operation. [*Mellor J.* The statute has worked injustice to this extent, that the appellants are not entitled to be reimbursed the expenses which they would have been reimbursed if the order had been carried out. *Wightman J.* The principle laid down in *Reg. v. The Inhabitants of St. Mary, Whitechapel (a)*, is that, if a statute intervenes to prevent a valid order of removal being carried out, the parish obtaining that order cannot remove the pauper. *Mellor J.* The pauper must remain with the appellants, and therefore they are liable for his maintenance.]

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PER CURIAM. (WIGHTMAN and MELLOR JJ.)

Judgment for the respondents.

(a) 12 *Q. B.* 120.

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Friday,
February 13th.

Settlement.
Apprenticeship.

The QUEEN against The Inhabitants of BARTON UPON IRWELL.

By indenture of the 29th September, 1845, *K.* was apprenticed to *L.* in the township of *B.* for five years; there were covenants by the master to pay weekly wages, and by the father to provide board and lodging during the apprenticeship. On each *Saturday* during the term *K.*'s works closed at two o'clock in the afternoon: throughout the term the pauper resided and slept every night except *Saturday*, and occasionally *Sunday*, at lodgings in *B.*; on each *Saturday* after leaving work he went, until shortly after his marriage, to the house of his father, who lived in *M.*: he slept there on *Saturday* night, and occasionally on *Sunday* night, and returned to his work on *Monday* morning. Shortly after his marriage, which took place about a year before the expiration of the term, he slept at his father-in-law's house, which was also in *M.*, on *Saturday* nights, and occasionally on *Sunday* nights. For the last eighteen months or two years of the term he lodged at the house of *C.* in *B.*, except on *Saturday* nights, when *C.* required the room which he occupied for members of her own family who came to see her on that day. He slept at his lodgings on the night of *Friday* the 27th September, 1850, and about two in the afternoon of the next day left off work and went to *M.*, and slept there that night and also on the *Sunday* night. On the *Monday* morning he returned to *N.*, and worked one week at the same rate of wages, and then left. Held, that he slept in *M.* as an apprentice on the last night of his apprenticeship, and therefore gained a settlement there.

UPON appeal at the Quarter Sessions for the city of Manchester, in April, 1862, against an order for the removal of *Sarah Ann Kay* and her five children (the eldest of whom was not above eleven years of age) from the township of *Hulme* to the township of *Barton upon Irwell*, in the county of *Lancaster*, the order was confirmed, subject to the following case.

Charles Kay, the husband of *Sarah Ann Kay*, was, by indenture bearing date the 29th September, 1845, bound apprentice to Messrs. *Nasmyth & Co.*, of *Patricroft*, in the township of *Barton upon Irwell*, engineers and ironfounders, for the term of five years from the

date of the indenture. In the indenture there was contained a covenant on the part of the masters to pay the apprentice certain weekly wages, and a covenant by the apprentice's father to provide him with board and lodging during the continuance of the apprenticeship. *Kay* entered the service of Messrs. *Nasmyth* immediately after the execution of the indenture, and continued in their service for the full term of five years, in manner hereinafter mentioned. On each *Saturday* during the whole of the term of the apprenticeship Messrs. *Nasmyth's* works closed at two o'clock in the afternoon. This is the hour at which it is usual for works of a similar description in the neighbourhood of *Barton upon Irwell* to close on the *Saturday*. Throughout the term of the apprenticeship *Kay* resided and slept every night, except *Saturday*, and occasionally *Sunday*, at lodgings in *Barton upon Irwell*, first at a house in *King Street*, next at a house in *Vicar Street*, and lastly at the house of a woman named *Nancy Chadwick*. On each *Saturday*, after leaving work about noon, he regularly went, until shortly after his marriage, to the house of his father, who lived in *Manchester*, about six miles from *Patricroft*. Here he slept on the *Saturday* nights regularly, and occasionally on the *Sunday* nights also, and returned to his work at *Patricroft* on *Monday* morning. Shortly after *Kay's* marriage, which took place about a year before the expiration of the term of his apprenticeship, he used to sleep at his father-in-law's house, instead of his own father's, on the *Saturday* nights and occasionally on the *Sunday* nights also: the father-in-law, however, lived in *Manchester* as well as the father. For the last eighteen months or two years of the term *Kay* lodged at the said *Nancy*

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Chadwick : the lodgings were taken by himself at 11 per week, and at the time of the arrangement *Sarah Chadwick* signified that he should not sleep at her house on the *Saturday* night, as members of her own family came over to see her on that day, and she required the room he occupied for them that night. *Key* slept at his lodgings in *Patricroft* on the night of *Friday* the 27th *September*, 1850, and about two in the afternoon of the following *Saturday* he left off work and went to *Manchester* to sleep, and slept there that night, and also on the following *Sunday* night. On the following *Monday* morning *Key* returned to *Messrs. Newby's*, and worked the week at the same rate of wages, and then left. Altogether *Key* slept more than forty nights at *Patricroft*, and more than forty nights in *Manchester*. In the month of *August*, 1861, *Key* deserted his wife, *Sarah Ann Key*, and his family, and left them chargeable to the township of *Hulme*, where they were residing at the time of his desertion.

On behalf of the appellants, it was contended that the night of the 28th *September*, 1850, was the night of the last day of the apprenticeship, and that, as the pauper's husband slept at the township of *Manchester* on that night, he consequently gained a settlement there.

On the part of the respondents it was denied that the apprenticeship was subsisting on the night of the 28th *September*, 1850, and if it was subsisting, that though in fact the pauper's husband did sleep in *Manchester* on the night of each *Saturday*, and on the night of the *Saturday* which was the last day of his apprenticeship, such residence had no reference to, and was not in furtherance

of his apprenticeship, and that therefore no settlement in *Manchester* was gained.

The deputy Recorder entertained the view taken by the respondents and confirmed the order.

If the Court should be of opinion that the view taken by the respondents was the correct one, then the order of justices and the order of Sessions were to stand ; otherwise they were to be quashed.

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Hopwood, in support of the order of Sessions.—First, the apprenticeship came to an end at two o'clock in the afternoon of *Saturday*, the 28th *September*, 1850, that being the hour at which the master's works always closed on *Saturday* ; *Rex v. The Inhabitants of Ribchester (a)*. *Wightman J.* Suppose the master, for some urgent matter, required the apprentice to work after two o'clock, he must have worked.]

Secondly. The sleeping of the apprentice being in *Manchester*, out of the parish in which his master's works were, was not referable to or in furtherance of the service under the apprenticeship: it was a matter of indulgence from his masters, or in pursuance of an arrangement between him and the landlord of his lodgings, who was not able to give him lodging on those nights. [*Mellor J.* His masters did not covenant to provide him with board and lodging anywhere.] In *Rex v. Ilkeston (b)* an apprentice, who lived and worked with his master in the parish of *Ilkeston*, went home to his father's, in the parish of *Radford*, every *Saturday*, and slept there on *Saturday* and *Sunday* nights, with his master's leave, and returned to work on *Monday* morning: the apprentice, having returned, and

(a) 2 M. & S. 135.

(b) 4 B. & C. 64.

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worked as usual on *Monday*, left his master in the evening and never returned; and it was held that, the sleeping in *Radford* being merely by way of indulgence, and not for the purposes of the apprenticeship, was not sufficient to confer a settlement in that parish.

In *Reg. v. The Inhabitants of Elswick* (a) an apprentice, except when absent in the neighbouring villages, while executing work there for his mistress, lodged, boarded and slept at his father's house in *G.*, going every day, except when so absent, to his work of a morning at *N.*, where his mistress carried on the business of a glazier and painter, and returning at night to *G.* For some weeks before the last day of his apprenticeship he had been working for his mistress at *B.*, where he lived and slept as such apprentice for more than forty days. On the *Tuesday* before the expiration of his apprenticeship he slept at *B.* On *Wednesday*, the last day of his apprenticeship, he left his work at *B.*, which was not then completed, at four o'clock p. m., without the knowledge or consent of his mistress, and went to *N.* for the purpose of seeing her, and ascertaining whether she would continue him in her service as a journeyman: he then went on to *G.*, and slept there that night; and it was held that a settlement was gained in *G.* But neither *Rex v. The Inhabitants of Ribchester* (b) nor *Rex v. Ilkerton* (c) were there cited: and the Court must have assumed that the sleeping at *G.* was by the direction of the mistress.

Crompton Hutton, contra.—The 28th *September*, 1850, was part of the five years of service under this apprenticeship. In *Rex v. The Inhabitants of Ribchester* (b) the

(a) 7 *Jur. N. S.* 45.

(b) 2 *M. & S.* 135.

(c) 4 *B. & C.* 64.

apprentice, having left his master on *Saturday*, never intended to return: he broke his indenture on that day. Suppose a legacy bequeathed to an apprentice at the end of his apprenticeship, and the facts were as in *Reg. v. The Inhabitants of Ribchester* (a), the apprentice would not get the legacy, because the apprenticeship never fully came to an end; but if such a legacy had been bequeathed in the present case, the apprentice would be entitled to it because the apprenticeship ran out by his sleeping in the respondent parish. In *Reg. v. The Inhabitants of Elswick* (b), where the apprentice quitted his work on the last day of his apprenticeship, there was no breaking off from it, and he slept at G. under the apprenticeship.

Secondly. The sleeping in *Manchester*, whether at *Vancy Chadwick's* or at the house of the apprentice's father and of his father-in-law, was not by way of recreation or indulgence: the house of his father, and of his father-in-law, was his regular place for lodging on *Saturday* and *Sunday* night, whether his masters knew and consented to it or not, which amply distinguishes the present case from *Reg. v. Ilkeston* (c). *Reg. v. The Inhabitants of Elswick* (b) is in favour of the respondents on this point.

WIGHTMAN J. The question is in which of these two townships did *Charles Kay*, the husband of the pauper, gain a settlement. Under the indenture of apprenticeship he had resided in the appellant township long enough to gain a settlement there, and equally so to gain a settlement in the township of *Manchester*. The

(a) 2 M. & S. 135.

(b) 7 Jur. N. S. 45.

(c) 4 B. & C. 64.

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question then ultimately to be determined for ascertaining the settlement is, in which of the townships did he sleep on the last night of his apprenticeship? On that night he slept in *Manchester*. Did he become settled there by reason of that pernoctation?

It is said that he did not, for two reasons: first, because the apprenticeship ceased at the time when he left work at 2 o'clock on the afternoon of *Saturday*, the 28th *September*; though I think this was not very seriously contended for; and the present case is clearly distinguishable from *Rex v. The Inhabitants of Ribchester* (a), where the apprentice broke his indenture, and was away from his master without an *animus revertendi*. Here the masters had a right to the service of their apprentice through the whole of *Saturday*, though the practice was that he was not required to do any work in the afternoon of that day.

The second point, which was most pressed in argument, was, whether the sleeping in *Manchester*, on the night of the 28th *September*, was a residence in furtherance of the apprenticeship, according to the expression in most of the cases, or merely for recreation, and without any necessity or requirement for his sleeping there. It seems to me that *Rex v. Ilkeston* (b) is not inconsistent with *Reg. v. The Inhabitants of Elswick* (c). In *Rex v. Ilkeston* there was no question as to where the apprentice last slept, viz. in *Radford*; but he had gone there by the indulgence of his master, there was no reason why he should not have slept at his master's house, and it was held that this sleeping at *Radford* was not sufficient to confer a settlement there; but *Abbott C. J.* said, p. 67:—"There may, indeed, be

(a) 2 M. & S. 135.

(b) 4 B. & C. 64.

(c) 7 Jur. N. S. 45.

cases, and some such have arisen, where an inhabitation in a parish different from that in which the master resides may be in furtherance of the service ; for instance, where a master cannot take an apprentice into his own house, and appoints or allows him to choose a residence in another parish, so that he may return to his work every morning." Here the apprentice was not sleeping away from the township in which his masters' works were as an indulgence ; but his masters, not having covenanted to find lodging, allowed him to lodge elsewhere, and accordingly for five nights in the week he lodged with *Nancy Chadwick*, in *Manchester* ; and, as she could not take him in on *Saturday* night, he went to his father's house, not as a mere indulgence of his masters ; for he must sleep somewhere, and it was in his option to be with his father or his father-in-law instead of looking out for lodgings. It is not found whether his masters knew or approved of his doing so ; probably they did not care, because he came regularly to his work. In *Rex v. Ilkeston (a)* *Bayley J.* says :—"Where the master appoints no place for the pauper to sleep, or appoints a place out of the parish where the service is performed, I agree that a settlement is gained in the parish where the apprentice sleeps," and he cited two cases which proceeded on that ground. He adds, "But if an apprentice in general resides with his master, and is allowed once a week, as an indulgence, to visit his parents in another parish, he does not lodge there as an apprentice, and I cannot see that the case is varied, whether the indulgence be for days or for months." That language would be applicable to the present case if the pauper's husband had lodged in *Manchester* merely

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(a) 4 B. & C. 64. 68.

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by indulgence. But he lodged there as an apprentice, and therefore the appellants are entitled to succeed.

MELLOR J. (the only other Judge present). When the judgments of *Abbott C. J.* and *Bayley J.*, in *Rex v. Ilkeston (a)*, and particularly the latter, are read, the present case may be determined precisely on the distinction suggested in them. In its facts that case is entirely distinguished from the present, because the apprentice had lodged with his master, and the allowing him to sleep at his father's house on *Saturday* and *Sunday* was simple indulgence towards him. Here he did not reside in the parish in which he worked, but had a general licence from his masters to lodge where he liked, provided he came to his work on *Monday*. Here also the father agreed to find lodging for his son, and then an arrangement was made with *Nancy Chadwick* for his lodging at her house, and as she could not take him in on *Saturday* and *Sunday*, he found a lodging with his father or father-in-law on those nights, but he went there, not for recreation or by the indulgence of his masters, but for his board and lodging, which he must have somewhere, otherwise he would not be able to return on *Monday* morning. The present case is therefore distinguished from *Rex v. Ilkeston (a)*, though the language of the Judges is applicable; and I agree with my brother *Wightman* that our judgment ought to be for the appellants.

Order of Sessions quashed.

(a) 4 B. & C. 64.

1868.

HARGREAVES, appellant, TAYLOR, respondent.*Saturday,
February 21st.*

By the Public Health Act, 1848, 11 & 12 Vict. c. 63. s. 54., the surveyor of the Local Board of Health may examine any drain, water-closet, privy, cesspool, or ash pit, and if it is in bad order and condition the Board shall cause notice in writing to be given to the owner or occupier of the premises, requiring him to do the necessary works; and if such notice be not complied with, the party shall be liable to a penalty for every day during which he makes default: Held, that the discretion to determine what works are necessary to be done is vested in the Board, and that, on a proceeding before justices to recover the penalty under sect. 129, they have no jurisdiction to review its determination.

*Public Health
Act, 1848,
11 & 12 Vict.
c. 63. s. 54.
Necessary
works.
Discretion of
Board.
Jurisdiction
of justices.*

CASE stated by justices under stat. 20 & 21 Vict.
c. 43.

At a Petty Sessions holden at *Taunton* before justices of the county of *Somerset*, a summons issued by the appellant, surveyor of the *Taunton* Board of Health, in their behalf, against the respondent, under the 54th and 129th sections of The Public Health Act, 1848, 11 & 12 Vict. c. 63., for disobedience of a notice of the Board, requiring him to construct, under three combined privies, his property, a continuous eject of nine inch brickwork set in cement, the new eject to be trapped and connected with the *Mary Street* sewer, and to have an attached efficient water supply sufficient for the immediate removal of the soil, was heard and dismissed.

The appellant was the owner and part occupier of the premises mentioned in the summons; and the same were situate in the borough of *Taunton* and within the jurisdiction of the Local Board of Health. Complaint, in writing, of the premises as a nuisance having been duly made to the Local Board, the surveyor, with their authority, entered upon and examined them, after notice

1863. to the respondent, according to law ; and upon his
 HARGREAVES report, specifying certain works as necessary to be done
 v. in order to abate the nuisance, the Local Board caused
 TAYLOR. notice to be served on the respondent, ordering those
 works to be done to the satisfaction of the surveyor.
 The respondent afterwards executed and completed all
 the works required by the notice, with the exception of
 providing an attached water supply, but at the hearing
 of the summons he proposed to undertake that water
 should be, from time to time, thrown into the eject
 sufficient to keep it clear.

The justices considered that the respondent had
 done all the works which were necessary and sufficient,
 although he had not executed all the works which the
 notice of the Local Board required.

[The case set out the evidence upon which the justices
 came to that determination.]

The question for the opinion of the Court was, whe-
 ther the justices had authority to inquire into the
 necessity of the works ordered, or whether the penalties
 were recoverable upon proof merely of default made in
 the execution of the works which the surveyor deemed
 necessary upon an examination of the premises, and the
 execution of which the Local Board had accordingly
 required.

The case was argued in *Michaelmas Term* (Nov. 12th,
 1862), before COCKBURN C. J., WIGHTMAN, BLACKBURN
 and MELLOR JJ.

No counsel appeared for the respondent.

Coleridge (*Folkard* with him), for the appellant. — First.
 The Public Health Act, 1848, 11 & 12 *Vict. c. 63. s. 54.*
 enacts ; “ that the Local Board of Health shall see and

provide that all drains whatsoever, and the waterclosets, privies, cesspools, and ashpits within their district, are constructed and kept so as not to be a nuisance or injurious to health ; and the surveyor may, by written authority of the said Local Board (who are hereby empowered to grant such authority, upon the written application of any person shewing that the drain, watercloset, privy, cesspool, or ashpit in respect of which application is made is a nuisance or injurious to health, but not otherwise), and after twenty-four hours' notice in writing, or in case of emergency without notice, to the occupier of the premises to which such drain, watercloset, privy, cesspool, or ashpit is attached or belongs, enter such premises, with or without assistants, and cause the ground to be opened, and examine and lay open such drain, watercloset, privy, cesspool, or ashpit ; but if upon such examination such drain, watercloset, privy, cesspool, or ashpit appear to be in bad order and condition, or to require alteration or amendment, he shall cause the ground to be closed, and the said Local Board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the examination is made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works ; and if such notice be not complied with, the person to whom it is given shall be liable to a penalty not exceeding 10s. for every day during which he continues to make default, and the said Local Board may, if they shall think fit, execute such works, and the expenses incurred by them in so doing shall be recoverable by them from the owner in a summary manner, or, by order of the said Local Board, shall be declared to be private improvement expenses, and be recoverable as such

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1863. in the manner hereinafter provided." What are the
 HARGREAVES necessary works must be set out in the notice ; and when
 v. notice has been duly given to do the necessary works
 TAYLOR. under sect. 54, and the Board of Health go before justices for the purpose of enforcing it, the justices are not to rehear the case. Here the Board of Health having exercised the discretion vested in them of deciding what works were necessary to be done by the owner of the house, it was beyond the jurisdiction of the justices to say that the works ordered were not necessary. The legislature could not have intended that, in a matter peculiarly in the knowledge of the Board of Health, two justices in Petty Sessions should review the decision of that Board. [*Wightman J.* Suppose the justices are of opinion that the penalty has not been incurred, because the works directed to be done have been executed.] That is a fact into which they have a right to inquire. In *The Vestry of St. Luke, Middlesex*, appts., *Lewis*, respt. (a), upon The Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 81., it was held that the vestry, had power, if necessary, to convert an insufficient privy into a watercloset, and that, having exercised that power, a police magistrate was wrong in refusing to order the owner of the house to pay the expenses. [*Wightman J.* That case would be in point if stat. 11 & 12 Vict. c. 63. s. 54. had given the Local Board power to order an effective water supply : stat. 18 & 19 Vict. c. 120. s. 81. empowers the vestry to determine whether there shall be a watercloset. *Blackburn J.* Stat. 18 & 19 Vict. c. 120. s. 211. gives an appeal against any order of the vestry or District Board to the Metropolitan Board of Works. *Cockburn C. J.* Under stat. 11 & 12 Vict.

(a) 1 B. & S. 865.

c. 63. there is no appeal against the order of the Board of Health : sect. 135 only gives an appeal to any person aggrieved " by any order, conviction, judgment, or determination of or by any matter or thing done by any justice or justices" where the penalty or sum adjudged shall exceed 20s.] If the justices made an order in support of the order of the Board of Health, that might be appealed against, but the Board of Health cannot appeal against the refusal of the justices to make an order. [*Blackburn J.* Stat. 11 & 12 Vict. c. 63. s. 54. gives the Local Board power to direct the owner or occupier " to do the necessary works"—not the works which they or the surveyor may think necessary; and the justices have only said that the Local Board have called upon the respondent to do more than was necessary. *Mellor J.* The words of sect. 54 are, " if such notice be not complied with, the person to whom it is given shall be liable to a penalty." He referred to sect. 49.] Sect. 54, in effect, says that the works to be done shall be such as appear to the surveyor to be necessary. [*Wightman J.* Suppose many of the things which the surveyor has thought necessary to be done are, by the concurrent testimony of witnesses, not necessary, or more expensive than necessary. *Cockburn C. J.* Policy and expediency seem to require that, if the Board of Health have jurisdiction to determine whether an alteration is necessary, they should also determine what alteration is necessary. Even after the determination of the justices dismissing the complaint, the surveyor may go again and order the same work to be done. But could it have been intended that the power of the Board of Health should not be subject to any appeal?] That Board is an elected body, and may be trusted with absolute power ;

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though *Tinkler v. The Wandsworth District Board of Works* (a) conflicts with that proposition. [*Mellor J.* The objects of stat. 11 & 12 *Vict. c. 63.* could not be carried out without the exercise of a certain amount of arbitrary power.] The justices have a discretion given to them for the first time by sect. 129, which enacts "that in all cases in which the amount of any damages, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner the same may be ascertained by or recovered before two justices." Under that section they are only to tax the bill for the expenses incurred by the vestry in executing the works, by seeing that the works have been properly executed and the sums charged have been paid.

Secondly. The justices came to a wrong conclusion on the question of fact; and they have set out the evidence on which they decided. [*Blackburn J.* We do not sit as a Court of appeal on a question of fact (b).]

Cur. adv. vult.

MELLOR J. (*Feb. 21st*) delivered the judgment of the Court.

The question for our decision in this case depends upon the construction to be put upon the 54th section of The Public Health Act, 1848, 11 & 12 *Vict. c. 63.* The case is not free from difficulty, and the doubts expressed by my brother *Blackburn* during the argument are not altogether dispelled, but he does not dissent from the views entertained by the other members of the Court, that the discretion to determine what works are ne-

(a) 2 *De G. & J.* 261.

(b) See *Cornwell*, appellant, *Sanders*, respondent, *ante*, p. 206.

cessary to be done within the 54th section is vested in the Board of Health and not in the justices at Petty Sessions.

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The section begins by declaring that the Local Board of Health shall see and provide that all drains whatsoever and the waterclosets, &c., within their district, are so kept as not to be a nuisance to the public health, and in the event of the necessary works not being done in pursuance of their notice, the Local Board may execute the works themselves and recover the expenses in a summary manner, or order them to be declared private improvement expenses recoverable from the owner or occupier by means of a rate in the manner provided by the Act.

Under such circumstances it seems more reasonable to hold that the discretion as to the nature and extent of the works required to be done is vested in the Local Board rather than in the justices at Petty Sessions, and we are therefore of opinion that the justices were wrong in assuming a jurisdiction to review the determination of the Board of Health as to this matter. We think therefore that our judgment must be for the appellant.

Judgment for the appellant.

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Saturday,
February 21st.

PEASE and others *against* HENRY CHAYTOR,
Esquire, and another.

*Church rate.
Validity of
rate disputed.
Action against
justices.
Reasonable
and probable
cause.
Misdirection.
53 G. 3. c. 127.
s. 12.
Costs of
quashing
order.
Judgment in
replevin.
Evidence.*

Declaration against justices of the peace alleged that the plaintiffs were rated to a church rate, the validity of which rate was disputed by them; that they were summoned for nonpayment of the rate; that at the hearing before the defendants, the plaintiffs, in good faith disputing the validity of the rate, gave the defendants notice thereof: yet the defendants, not acting bona fide in the belief that they were acting in conformity to law, and when they well knew that they had not jurisdiction to proceed, made an order for payment of the rate, which order was afterwards quashed, and issued their warrant of distress, by virtue of which the goods of the plaintiff were distrained. Pleas: 1. Not guilty. 2. As to the distraining of the goods of the plaintiffs, that the warrant was issued on the application of the churchwardens, and executed by their direction, as well as by the command of the defendants, and that the plaintiffs afterwards recovered judgment in replevin in the County Court. On the trial it appeared that the plaintiffs objected before the justices to the validity of the rate; but the defendants overruled the objections, and made the order, and subsequently the distress warrant, to enforce the payment of it. The order was made on the 6th January, 1859; the distress warrant was signed by the plaintiffs on the 3rd February, and the seizure under it was on the 14th March. On the 27th April the plaintiffs obtained a rule nisi for a certiorari to quash the order, and on the 11th of June the order was quashed. The action was commenced on the 13th of June. An examined copy of the judgment in the action of replevin, not under the seal of the County Court, was produced by the registrar of the Court. The Judge directed the jury that, if they believed that the plaintiffs bona fide intended to dispute, and did dispute, the validity of the rate, and gave notice thereof to the defendants, who, notwithstanding determined to proceed, the plaintiffs were entitled to recover; but if they thought that the objections made by the plaintiffs to the validity of the rate were put forward merely as a pretext for the purpose of evading payment thereof, and ousting the jurisdiction of the justices, they should find for the defendants. Held,

1. Per *Wightman* and *Blackburn JJ.*, *Mellor J.* dissentiente, that the justices were not liable unless they acted without reasonable and probable cause in deciding that the rate was not bona fide disputed; and therefore there was a misdirection in not leaving to the jury the question whether the justices acted without reasonable or probable cause for their decision.

2. Per *Wightman*, *Blackburn* and *Mellor JJ.*, that, as regards the making of the order, the defendants, if they needed protection, were protected by stat. 53 G. 3. c. 127. s. 12., which enacts that an action brought for any thing done in pursuance of the Act shall be commenced within three calendar months next after the fact committed: and

3. That the examined copy of the judgment in the County Court was sufficient proof of the substance of the second plea; and that the judgment in replevin was a bar to the recovery of damages for the seizure: and

4. That the costs of bringing up and quashing the order were no part of the damage arising from the seizure; and *quære*, whether they could have been recovered as special damage if the action, as regards the making of the order, had been brought within the three months limited by stat. 53 G. 3. c. 127. s. 12.

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v.
CHAYTOR.

THIS was an action, commenced on the 13th *June*, 1859, against the defendants, justices of the peace for the county of *Durham*, for granting their warrant to enforce the payment of a church rate for the chapelry of *St. Helen's, Auckland*, in that county, the amount of which was under 10*l.*, and the validity of which was disputed.

The declaration contained two counts. The first count, and the second plea, which was pleaded to so much of it as related to the distraining of the goods of the plaintiffs, are set out in the report of the case on demurrer (see 1 *B. & S.* 658).

The second count applied to a similar order for the payment of another rate amounting to 5*s.* 4*d.*, and the warrant issued thereon. The third plea to the second count was the same as the second plea to the first count.

The first plea was not guilty by statute (7 & 8 *W.* 3. c. 34 s. 4.; 1 *G.* 1. stat. 2. c. 6. s. 2.; 53 *G.* 3. c. 127. ss. 6, 12.; 11 & 12 *Vict.* c. 44. s. 10.)

The replications to the second and third pleas, respectively protesting that there were no records of the supposed recoveries in those pleas respectively mentioned, took issue on the residue of those pleas respectively.

Second replication to the second plea: that there was not any record of the supposed recovery in that plea mentioned remaining in the said County Court; and thereupon the defendants were commanded that they have the record here, on &c.

Similar replication to the third plea.

On the trial, before *Mellor J.*, at the Spring Assizes for the county of *Durham*, in 1862, evidence was given that certain objections were urged before the justices

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on behalf of the plaintiffs to the validity of the rate, on the ground, amongst others, that certain houses occupied by persons employed at the colliery of the plaintiffs were omitted from it. Several cases were cited to the defendants, and amongst others *Reg. v. Nunneley (a)*, and a witness was called to prove the facts upon which one of the objections was grounded; but the defendants said that the same objection had been overruled by them on a former occasion, and they then overruled the objections, and refused to forbear giving judgment, and made the orders, and subsequently the distress warrants, to enforce the payment of the rate. The defendants were called as witnesses on the trial, and whilst each stated that he had come to the conclusion that the objections were not urged bonâ fide, one of them (the defendant *Chaytor*), on cross-examination, said, "We held it not to be bonâ fide, because we thought it a bad objection: that was the ground upon which we proceeded." The orders upon the plaintiffs were made on the 6th *January*, 1859, the warrant to distrain on the 3d *February*, and the distress on the 14th *March*. A rule nisi for a certiorari to bring up the orders was obtained on the 27th *April*, and was made absolute on the 9th of *May*. The rule nisi to quash the orders was obtained on the 2d *June*, and the rule made absolute, no cause being shewn against it, on the 11th of *June*.

In support of the second plea the Registrar of the County Court of *Durham* produced an examined copy of the judgment in an action of replevin in that Court, brought by the plaintiffs against the churchwardens for distraining their goods under the warrant of the defendants, which judgment was in the form given in the *Rules and Orders for regulating the Practice of the County Courts, Schedule*

(a) *E. B. & E.* 852.

of Forms, 45; "*Judgment for Plaintiff*" (a). The examined copy was objected to as not admissible in evidence because not under the seal of the County Court; but the learned Judge admitted it. The replevin suit was commenced before the certiorari was moved for, but further proceedings in it were postponed until after the orders were quashed.

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The learned Judge directed the jury that, if they believed that the plaintiffs bonâ fide intended to dispute, and did dispute, the validity of the rate in question, and gave notice thereof to the defendants, who, notwithstanding, determined to proceed, the plaintiffs were entitled to recover; but, if the jury thought that the objections made by the plaintiffs to the validity of the rate were put forward merely as a pretext for the purpose of evading payment thereof, and ousting the jurisdiction of the justices, they should find for the defendants; and he declined to submit, as a question for the jury, the motives which influenced the defendants in their decision.

The jury, upon this direction, found their verdict for the plaintiffs, with 74*l.* damages, the amount of the bill of the plaintiffs' attorney for proceedings taken to quash the orders.

In the following *Easter Term*, *Manisty* obtained a rule nisi, pursuant to leave reserved at the trial, to enter the verdict for the defendants, on the grounds that the action was brought too late; or that the judgment recovered in the County Court was an answer to it, or that, as to so much of the causes of action as related to the making of the orders of the 6th *January*, 1859, and the warrants of the 3d of *February*, 1859, and the costs of removing

(a) See *Practice of the County Courts*, by *Pollock and Nicol*, 4th ed., App. p. 114.

1863. and quashing those orders, the action was brought too
 PEASE late, and as to the residue of the causes of action the
 V. judgment recovered in the County Court was a good
 CHAYTOR. answer: or to reduce the damages to 1s., on the ground
 that the plaintiffs were not entitled to recover the
 costs of removing and quashing the orders of the defen-
 dants: or for a new trial, on the ground of misdirection.

At the sittings in banc after *Trinity Term*, *June* 19th,
 26th,

Monk, Hindmarch, and Davison shewed cause.—*First*.
 As to the direction to the jury, the justices had no
 jurisdiction to determine that the plaintiffs did not *bonâ*
fide intend to dispute the validity of the rate. The third
 proviso to stat. 53 *G. 3. c. 127. s. 7.* takes away the
 power of the justices to levy the amount of the church
 rate “if the validity of such rate, or the liability of the
 person from whom it is demanded to pay the same, be
 disputed.” [They cited *Ricketts v. Bodenham* (a), per
 Lord *Denman*.] In stat. 5 & 6 *W. 4. c. 74.*, for the
 more easy recovery of tithes, which is a statute in *pari*
materiâ with the former, the proviso to sect. 1 restrains
 the Act from extending to cases in which the actual
 title or liability or exemption of the property “shall be
bonâ fide in question;” but the above proviso to stat.
 53 *G. 3. c. 127. s. 7.* does not mention *bona fides*. *Rex*
v. Wrottesley (b), and the cases following it, which say
 that under that statute there must be a *bonâ fide* dispute,
 have interpolated that phrase, and ought to be recon-
 sidered. A mere assertion of title does not oust the
 jurisdiction of the County Court, (*In re Emery and*
Barnett (c), per *Williams J.*), because, although stat.

(a) 4 *A. & E.* 433. 444.

(b) 1 *B. & Ad.* 648.

(c) 4 *C. B. N. S.* 423. 430.

9 & 10 *Vict. c. 95. s. 58.* contains a proviso that the County Court shall not have cognisance of any action in which the title to any corporeal or incorporeal hereditaments "shall be in question," it could not come in question until evidence was given; the Judge, therefore, must of necessity, determine that point for the time, but his determination of it is not final; *Thompson v. Ingham* (a). Admitting that there must be a bonâ fide dispute, according to the finding of the jury there was such in the present case, and the justices cannot give themselves jurisdiction by finding the contrary. In *Rex v. The Chapelwardens of Milnrow* (b), the first case in which a question of bona fides was introduced, it was held that it was sufficiently intimated to the justices by the party that he disputed his liability, though the reason given might be a bad one. [*Blackburn J.* In that case the order had been appealed against, and the Quarter Sessions, who are the proper judges of fact, found that what the appellant stated at the hearing before the justices who made the order was sufficient notice to them that he disputed his liability.] In *Dale v. Pollard* (c) the special case found that "the justices . . . knew that the plaintiff denied and disputed, and intended to deny and dispute, the right of a minority to impose a church rate against the vote of a majority," and the justices having issued a warrant to levy the rate upon the plaintiff's goods, he recovered in replevin. [*Wightman J.* The case there did not find that the justices came to the conclusion that there was no bonâ fide dispute as to the validity of the rate. *Blackburn J.* And it did find that they knew that there was a real

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(a) 14 Q. B. 710.

(b) 5 M. & S. 248. 254.

(c) 10 Q. B. 504.

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dispute. The questions of bona fides did not arise.] In *Reg. v. Colling (a)* Lord Campbell said, p. 826, "If the party summoned objects that the rate is invalid, and does so bonâ fide, however erroneous the objection may be, the magistrates cannot enquire into the validity of the rate, but must proceed no farther. . . . They were not to consider whether the reasons of dispute were well or ill founded; the question for them was, whether or not the rate was bonâ fide in dispute." And *Coleridge J.*, p. 828, "I do not agree that they" (the justices) "were conclusively judges whether or not the rate was disputed bonâ fide. It would still be for a jury to decide that point, if the matter came before them. And, if the only reason to doubt the good faith was the nature of the objections, I should think a jury ought to say that the opposition was bonâ fide." In *Reg. v. Nunneley (b)* Lord Campbell said, "The justices have jurisdiction only where the rate is undisputed: if it be bonâ fide disputed they have no jurisdiction. What they have to decide is, therefore, Is this rate bonâ fide disputed? They cannot give themselves jurisdiction by deciding, without evidence, that the dispute is not bonâ fide." Therefore, though the justices decide that the dispute was not bonâ fide, still it is for a jury or the Court to determine that question. [*Blackburn J.* Not unless there was no reasonable evidence on which the justices might have come to that conclusion. *Wightman J.* Then ought not the jury to have been directed to consider whether the justices had reasonable ground for believing that the parties did not bonâ fide dispute the validity of the rate?] There was no evidence to raise that question. The churchwardens gave no answer to the objection made to the rate before the justices;

(a) 17 Q. B. 816.

(b) E. B. & E. 852. 858-859.

and the ground on which the justices held that the rate was not bonâ fide disputed was that the objection was bad. [*Wightman J.* They may have decided that there was not a bonâ fide dispute on other evidence tending to shew it. The allegation in the declaration is, that the defendants, "not acting bonâ fide on the belief that they were acting as such justices as foresaid, or that they were acting in conformity with law."] That allegation is not necessary if their bona fides is immaterial. The distress warrant proceeds on the ground that the plaintiffs are Quakers. [*Blackburn J.* That is only relevant to the question whether the justices acted bonâ fide. In *Rex v. Wrottesley (a)* it was decided that the justices were bound to determine whether there was a bonâ fide dispute; suppose they make a mistake in deciding that there was no bonâ fide dispute, will an action of trespass lie against them? It is referred to *Acherley v. Parkinson*, per *Le Blanc J. (b)*, *Worford v. Fitzroy (c)*, and *Houlden v. Smith (d)*.] Yes; because the proviso to stat. 53 G. 3. c. 127. s. 7. takes away their jurisdiction in that case, and stat. 11 & 12 Vict. c. 44. s. 2. makes a justice of the peace liable to an action for any act done by him "in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction." [*Wightman J.* In the present case the justices may have determined wrongly that they had jurisdiction, but then they have determined wrongly a matter within their jurisdiction. If they are satisfied that the dispute is not bonâ fide, what are they to do? *Mellor J.* They may decline to grant their warrant, and this Court

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(a) 1 B. & Ad. 648.

(b) 3 M. & S. 411. 427.

(c) 13 Q. B. 240.

(d) 14 Q. B. 841.

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would not issue a mandamus to them if there was a reasonable doubt; *Reg. v. Byrom* (a).] The sheriff has often difficult questions to determine, but he is liable to an action by a person aggrieved. [*Wightman* J. The sheriff is not a judicial officer.] He is liable for refusing to allow the vote of a person entitled to vote; *Ashby v. White* (b). [*Blackburn* J. Not unless malice be alleged and proved; *Tozer v. Child*, in error (c). He also referred to *Bunbury v. Fuller*, in error (d), adopted by *Erle* J., in *Reg. v. Nunneley* (e).]

Secondly. By stat. 53 G. 3. c. 127. s. 12., "if any action or suit shall be brought or commenced for anything done in pursuance of this Act, every such action or suit shall be commenced within three calendar months next after the fact committed, and not afterwards." The making of the order not being within the jurisdiction of the justices was not an act done in pursuance of this Act, and therefore the defendants are not protected by sect. 12, and the action is brought within the six calendar months limited by stat. 11 & 12 Vict. c. 44. s. 8. [*Wightman* J. The constable exceeding his authority in the execution of the warrant is protected by sect. 12 of stat. 53 G. 3. c. 127.; *Theobald v. Crichmore* (f), and the cases cited in note (c) to 2 *Chitty's Statutes*, by *Welsby* and *Beavan*, p. 710, 2nd ed.] In those cases there was in the statute under which the justices had professed to act no express provision prohibiting the act done. [*Blackburn* J. In *Beechey v. Sides* (g) Lord *Tenterden* said, "It has uniformly been held, that where a party bona

(a) 12 Q. B. 321; and see *Ex parte Mannering*, 2 B. & S. 431.

(b) 2 Ld. Raym. 938. See note to S. C. in 1 Smith. L. C. 244, 5th ed.

(c) 7 E. & B. 377.

(d) 9 Exch. 111, 140.

(e) E. B. & E. 852, 861.

(f) 1 B. & A. 227.

(g) 9 B. & C. 806, 809.

fide believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause."'] The action was commenced within three months from the quashing of the order. [*Blackburn J.* "The fact committed," from which the damages sought to be recovered arose, was the making of the order.] The seizure is a continuance of the order, so as to make the justices responsible for making it if the action is brought within three months from the seizure, otherwise they might always exempt themselves by delaying to issue their warrant. [*Blackburn J.* They are liable for the seizure if an action is brought within three months after it. He cited *Collins v. Rose (a)*.] This action was brought within that time.

Thirdly. By sect. 111 of stat. 9 & 10 *Vict. c. 95.* a note of all judgments shall be entered in a book, "and such entries in the said book, or a copy thereof bearing the seal of the Court, and purporting to be signed and certified as a true copy by the clerk of the Court, shall at all times be admitted in all Courts and places whatsoever as evidence of such entries, and of the proceedings referred to by such entry or entries, and of the regularity of such proceeding, without any further proof." The examined copy of the judgment in the County Court, not being sealed by the seal of that Court, was not admissible evidence of the judgment. And if it was it did not prove all the allegations in the second plea—it mentioned only the names of the parties and the particulars of the claim; but nothing about the defence. [*Wightman J.* The examined copy is reasonable proof of the judgment. *Blackburn J.* And

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(a) 5 M. & W. 194.

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the substance of the plea is proved by it.] If the plea is proved, the judgment in replevin would only be for the expenses of getting the goods back, not for damages for the trespass; *Tidd's Practical Forms*, p. 611. At any rate it is no bar to the recovery of damages for the wrongful act of seizure. *Sommerville v. Mirehouse* (a) is no authority against the plaintiffs, for that was an action simply for making an order for payment of church rate.

Fourthly. The costs of removing and quashing the orders, which was a step reasonably taken by the plaintiffs for redressing the wrongful act of the defendants, are recoverable in this action. [*Blackburn J.* The plaintiffs, without quashing the orders, might get back their goods by a replevin suit, or their value by an action of trespass against the person who executed the warrant.] But the justices are protected by stat. 11 & 12 *Vict. c. 44 s. 2*, unless the order has been quashed. [*Wightman J.* Could an action be brought for wrongfully issuing a writ of fieri facias or of capias ad satisfaciendum if it were not executed? Has an action ever been brought against justices for granting a warrant of distress, if, doubting whether it could be supported, they withheld its execution? The plaintiffs have already recovered for all that was done under the warrant.] These costs are analogous to money paid by an attorney to procure the release of his client from an unlawful imprisonment, which are recoverable as part of the damages naturally and directly resulting from the wrongful act; *Addison on Torts*, p. 431, citing *Pritchett v. Boevey* (b).

Manisty and Heath, contra.—First. It is within the jurisdiction of the justices and their duty to inquire into and

(a) 1 B. & S. 652.

(b) 1 Cr. & M. 775.

determine the question whether the validity of the rate or the liability to pay it was bonâ fide disputed. In *Reg. v. Wrottesley* (a), decided on stat. 53 G. 3. c. 127. s. 7., which has always been cited with approval, the Court directed the justices to hear and examine, in order to ascertain whether the rate was bonâ fide disputed; and the Legislature, in framing the proviso to stat. 5 & 6 W. 4. c. 74. s. 1., confirmed the construction of the previous statute. [They also cited the observations of Cockburn C. J., Wightman and Blackburn JJ., in *Pease v. Chaytor* (b).] [Blackburn J. Those dicta were not necessary for the decision on the demurrer, because the declaration alleges that the defendants were "not acting bonâ fide in the belief that they were acting in conformity to law."] In *Reg. v. Nunneley* (c), upon affidavits which shewed that the rate was bonâ fide disputed, the Court quashed the order, but they do not say that an action would lie against the justices. *Reg. v. Colling* (d) is an authority for the defendants: Coleridge J. there says, "I do not agree that they" (the justices) "were conclusively judges whether or not the rate was disputed bonâ fide. It would still be for a jury to decide that point;" but he does not say in what action. It would be a question for the jury in a replevin suit, and in an action against those who put the parties in motion. [Wightman J. The jury might have to determine that question in prohibition.] *Dale v. Pollard* (e) was a replevin suit against the bailiffs who seized under a warrant to levy a church rate, and the question whether an action would lie against the justices if they acted bonâ fide in determining that

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(a) 1 B. & Ad. 648.

(b) 1 B. & S. 658. 671. 672. 674.

(c) E. B. & E. 852.

(d) 17 Q. B. 816. 828.

(e) 10 Q. B. 504.

1863. the rate was not bonâ fide disputed, was not raised.
 PEASE In *Reg. v. Cridland* (a), where parties had been convicted
 V. of a trespass in pursuit of game, under stat. 1 & 2 W. 4.
 CHAYTOR. c. 32. s. 30., notwithstanding they set up a claim of title
 to the land, *Erle J. and Crompton J.*, pp. 869, 872, ex-
 pressed an opinion that the justices must decide whether
 the claim was made bonâ fide. In the present case there
 was evidence to be submitted to the jury of the bona
 fides of the justices. And if they acted bonâ fide this
 action is contrary to the principle of law which gives
 immunity to officers in the performance of their duty;
Barnadiston v. Soame (b), *Barton v. Bricknell* (c), *Calder*
v. Halket (d).

Secondly. Assuming that the justices have jurisdic-
 tion to inquire whether the rate was bonâ fide disputed,
 if there was evidence before them that it was not,
 the remedy is by appeal against their order, which is
 given by stat. 53 G. 3. c. 127. s. 7. [*Blackburn J.* If
 the rate is bonâ fide disputed, the Sessions would have
 no more jurisdiction than the justices.] But if, on
 appeal, the Sessions decided that the dispute was a mere
 pretence, their decision would be final. [*Blackburn J.*
 I incline to think that still an action would lie.] In
Thompson v. Ingham (e) this Court interfered by prohi-
 bition, because no writ of error lay from the County
 Court. If the conclusion which the justices came to was
 wrong, an action would not lie against them for deciding
 wrongly; *Sommerville v. Mirehouse* (f), *Reg. v. Bolton* (g).

(a) 7 E. & B. 853.

(b) Note (a) to *Harman v. Tappenden*, 1 East, 568.

(c) 13 Q. B. 393.

(d) 3 Moo. P. C. C. 28.

(e) 14 Q. B. 710.

(f) 1 B. & S. 652.

(g) 1 Q. B. 66.

Thirdly. Stat. 11 & 12 *Vict. c. 44. s. 2.* reserves a right of action against a justice for any act done "in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction." This was clearly a matter in which the justices had jurisdiction, and, according to the definition of excess of jurisdiction suggested by *Jervis C. J.*, in *Ratt v. Parkinson (a)*, there was no excess of jurisdiction,—he said, "If necessary, the Court might perhaps draw a distinction between sections 1 and 2 of the 11 & 12 *Vict. c. 44.* But it is not necessary. Were it so, I confess I should be inclined to think that 'exceeding his jurisdiction' in sect. 2 means assuming to do something which the Act under which he is proceeding could by no possibility justify, as in the case in the Queen's Bench of *Leary v. Patrick (b)*, where there could have been no authority to issue a distress for costs, not adjudged by a conviction, or as was the case in *Barton v. Bricknell (c)*, in which case there was no power to order the plaintiff to be put in the stocks. But I abstain from pronouncing any opinion upon this point." [*Wightman J.* There is some difficulty in distinguishing between no jurisdiction and excess of jurisdiction: as soon as the justice exceeds his jurisdiction he is without jurisdiction.]

Fourthly. Assuming that the plaintiffs have a right to try the question before a jury, and admitting that they might recover for the seizure, there has been judgment in replevin against a co-trespasser in which they have got all the damages consequent on the wrongful taking, and costs; *Hoskins v. Robins (d)*, 7 *Bac. Abr.*, by

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(a) 20 *L. J., M. C.* 208. 212.(b) 15 *Q. B.* 266.(c) 13 *Q. B.* 393.(d) 2 *Wms. Saund.* 320, 6th ed.

1863. *Gcillim and Dodd*, 7th ed., *Replevin and Avowry*, (H) p. 92, (L) p. 107, and judgment in replevin may be pleaded in bar to an action of trespass; *White v. Willis* (a), citing *Doctr. Plac. Barre*, 65. 68; 2 *Seab. N. P.* 1221, 12th ed. [They also cited *Bishop v. Viscountess Montague* (b).] [Wightman J. Suppose the cattle seized were about to be employed in ploughing. Blackburn J. Or were injured by over driving or driving them improperly.] The object of the proceeding in replevin is to procure the restitution of the goods in order to try the right, and that the owner may have the use of his goods while the action for damages is going on. [Blackburn J. referred to *Mennie v. Blake* (c). Wightman J. referred to *George v. Chambers* (d). Blackburn J. For many years the plaintiff in replevin has not recovered substantial damages, and I doubt whether he could. In *Roscoe Ev.* 721, 10th ed., by *Smirke*, it is said "the damages recovered by the plaintiff are usually confined to the expense of the replevin bond. It is doubtful whether special damages arising from an injury to the goods by defendant or otherwise, can be recovered; *Conner v. Bentley*" (e).] In 2 *Chitt. Pl.* 647, 7th ed., the declaration in replevin concludes, "wherefore the plaintiff saith that he is injured, and hath sustained damages to the amount of £——," and a note directs the pleader to insert "any sum sufficient to cover the amount of the damages really sustained." Though there is no instance in which damages have been laid, there is no reason why they should not be. [They cited *Ash v. Wood* (f),

(a) 2 *Wils.* 87.(c) 6 *E. & B.* 842.(e) 1 *Jebb & Symes*, 246.(b) *Cro. Elis.* 824.(d) 11 *M. & W.* 149.(f) *Cro. El.* 59.

Saunders v. Fortescue (a), and Sedgwick on Damages, 1868.
498, 2d ed.]

Cur. adv. vult.

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Feb. 21st. There being a difference of opinion on the bench, the following judgments were now delivered.

WIGHTMAN J. The learned Judge upon the trial of this cause told the jury that, if the plaintiffs bonâ fide disputed the validity of the rate and intended so to do, and gave notice to the defendants that they did so dispute it, they ought to find for the plaintiffs; but that, if the jury thought that the plaintiffs' assertion that they disputed the validity of the rate was a mere pretence for the purpose of evading payment and ousting the jurisdiction of the magistrates, they should find for the defendants. The jury upon this direction found a verdict for the plaintiffs, and it must now be taken upon their finding that the plaintiffs did bonâ fide dispute the validity of the rate, and did give notice to the defendants that they did so.

A rule nisi, however, was granted for a new trial, on the ground that, in order to maintain an action against the defendants, it was not sufficient for the jury to find that the plaintiffs did bonâ fide dispute the validity of the rate and give notice of that fact to the defendants, but that they ought also to have found that the justices in proceeding notwithstanding the notice, acted maliciously, and without reasonable or probable cause, and that the learned Judge ought to have so directed them. This raises the question whether the defendants were acting within their jurisdiction when they came to the conclusion, upon the evidence before them, that the

(a) 1 *Wils.* 256, 257.

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plaintiffs did not bonâ fide dispute the validity of the rate,—it being assumed that their judgment was wrong, and that the plaintiffs did really and bonâ fide dispute it.

There can be no doubt that the defendants had jurisdiction in the first instance to entertain the complaint against the plaintiffs, by virtue of the 53 G. 3. c. 127. s. 7., but there is a proviso to the enacting part of that section “that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon.” The jurisdiction of the magistrates therefore ceases by the proviso if the party proceeded against disputes the validity of the rate, and gives them notice to that effect. But it is not enough for the party summoned to inform the magistrates that he disputes the validity of the rate, he must satisfy them that he really and bonâ fide disputes it. This has been determined by several cases that were cited upon the argument. The justices are not to try the validity of the ground for disputing the rate, but the bona fides of the person making the objection. This is a collateral question, and there is no doubt that it is a rule that, if the jurisdiction depends upon a collateral question, the magistrates cannot give themselves jurisdiction by a wrong decision upon that question, but, as observed by Lord Campbell in the case of *Reg. v. Nunneley* (a) (which is the last case in which this point was much discussed, and in which all the authorities were cited), the justices are not deprived of jurisdiction by palpably

(a) *E. B. & E.* 852. 857.

objections, and such as could lead to no other than that there was no reasonable ground for believing the rate, or for believing that the person from whom the rate was attempted to be enforced was bona fide in stating to the justices that he was. If this were not so, it would be useless for the justices to consider the question of bona fides at all, though it has been decided in the cases cited upon the point that they are bound to do so. It appears from the authorities, as it has been considered as settled that they have jurisdiction to consider whether the rate was bona fide, that they can only be liable to this action if they acted without any reasonable or probable cause for the decision they came to that the rate was not bona fide disputed; and I think that, as that was not left to the jury, the defendants are bound to make the rule absolute for a new trial.

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MR. J. read the following judgment of BLACK-

“In this case was obtained for a new trial, or the verdict differently. It cannot be made in both these forms. The conclusion I have come to is, that the defendants have a right to elect in which form they will make it absolute.

“The case was argued at the Sittings after *Trinity* 1862, before my brothers *Wightman*, *Mellor* and

“I first consider whether the defendants are bound to a new trial. The point on which there was ground for saying that there was misdirection is one of considerable importance and of nicety and difficulty, but, after consideration, I have come to the conclusion that the

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defendants are right in saying that the direction was imperfect.

The pleadings in this case came before this Court, then consisting of my Lord, my brother *Wightman* and myself, on demurrer : they will be found set out in the report of *Pease v. Chaytor* (a).

On the trial, it appeared in evidence that, when before the defendants as justices, the plaintiffs, by their agents, stated that they disputed the rate, it was asserted, on the other side, before the justices that the plaintiffs did not really and bonâ fide dispute the rate. So far, both parties were at the trial agreed on the facts ; there was a conflict as to what was the state of the evidence before the justices, and as to what the defendants then thought and said, but it was agreed what they did. The justices did not hold their hands, but proceeded to make the order, and under that order the plaintiffs' goods were seized.

My brother *Mellor* left to the jury the questions, whether the plaintiffs bonâ fide disputed the rate, and whether notice of that dispute was given to the justices (the defendants), and I think these were proper questions to be left to the jury. But he did not ask the jury whether the defendants, as justices, decided on the evidence before them that there was in fact no real dispute, which the justices might very possibly have honestly though mistakenly believed ; and no question was asked as to malice, nor as to whether the facts proved before the justices were such as, in the opinion of the Judge as a matter of law, would constitute reasonable and probable cause for coming to such a mistaken belief. The jury, having found for the plaintiffs on this direction, we must take the facts to be that the rate was really disputed,

(a) 1 B. & S. 658.

we are bound in this action to suppose the jury right (the justices wrong on the question of fact), and that the intention to dispute it was given; and if, upon the facts alone, the action lies, then the direction was

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But unless the action would equally lie against the justices, though honestly on the evidence before them, acting without malice and without the absence of reasonable and probable cause to the mistaken conclusion the dispute was not a bonâ fide dispute, the direction was imperfect, and the defendants are entitled to a trial to ascertain how these facts were.

The position of justices acting under this statute is peculiar: they have jurisdiction to enforce the rate, if the validity of the rate be disputed and the party disputing the same give notice thereof, they are to forbear giving judgment; but they are not to forbear judgment because the party says that he disputes the validity of the rate. This Court has in such cases compelled justices by mandamus to hear the matter; Lord Denby saying, "If, upon the hearing, this party satisfies the justices that there is a bonâ fide intention to contest the rate, the proceedings before them will go further;" *Rex v. Wrottesley* (a). So that it is the duty of the justices, enforceable by mandamus, to form their opinion judicially on the question, whether the dispute is bonâ fide or not, and act upon that opinion. It is not that they are liable in an action if it turns out that their opinion was mistaken. If so, the position of the justices is one of great hardship, for the wisest and most cautious of men are fallible and may come to a wrong conclusion; and, even if right, the justices would not be safe, for there is a possibility that a jury may honestly

(a) 1 B. & Ad. 648. 651.

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and properly enough, but mistakenly, think them
 and yet the event of the action must be regulated
 by the fact, but by the verdict. But I think it
 found that the law does not cast on the justice
 very great hardship. I think that the numerous
 which were cited on the argument, and all which,
 as I know, are to be found in the books, may be
 cited by a distinction between questioning the validity
 of the judgment of a Court of limited jurisdiction
 the ground that in fact the matter was not within
 limited jurisdiction of the tribunal, for the purpose
 preventing the enforcement of that judgment and
 questioning it for the purpose of maintaining an appeal
 against the Judges of that Court. In the first class
 proceedings the law, I think, is accurately laid down
 the judgment of the Exchequer Chamber in *Bunbury*
Fuller (a):—"It is a general rule, that no Court of limited
 jurisdiction can give itself jurisdiction by a wrong
 decision on a point collateral to the merits of the case
 which the limit to its jurisdiction depends; and however
 its decision may be final on all particulars, making
 together that subject matter which, if true, is within
 its jurisdiction, and, however necessary in many cases
 may be for it to make a preliminary inquiry, whether
 some collateral matter be or be not within the limits,
 upon this preliminary question, its decision must always
 be open to inquiry in the superior Court. Then to
 the simplest case—suppose a Judge with jurisdiction
 limited to a particular hundred, and a matter is brought
 before him as having arisen within it, but the party
 charged contends that it arose in another hundred,
 is clearly a collateral matter independent of the merits

(a) 9 *Exch.* 111. 140.

n its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forbore or proceeded on the main question in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake."

It will be found that the cases cited in the argument of the present case, and relied on by the counsel for the plaintiffs, are cases of prohibition and of certiorari, in which the object of the proceeding is to prevent the enforcement of the order; and in many, if not all of them, language is used shewing that the Judges had in their mind the distinction pointed out in the above extract, that such a point must be determined for the time, but is not determined conclusively; and such I think would be the rule in any proceeding taken by the one party for the purpose of enforcing the judgment of the inferior Court, or by the other for resisting it. But when, as in the present case, an action is brought against the person who, acting with a limited jurisdiction, has by mistake decided the point for the time the wrong way, and has proceeded when, had he known the true state of facts, he might not, the rule of law is different, and is, I conceive, as laid down by Lord *Wensleydale*, then *Parke B.*, in reversing the judgment of the Privy Council in *Calder v. Halket* (a),—"It is well settled," says he, "that a Judge of a Court of record in *England*, with limited jurisdiction, or a justice of the peace, acting judicially, with special and limited authority, is not liable to an action

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(a) 3 Moo. P. C. C. 28. 77.

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of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron *Powell*, in *Gwinne v. Poole* (a), it is laid down, that a Judge of a Court of record in a borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron *Powell* illustrates by a reference to *The Case of the Marshalsea Court* (b), which had jurisdiction only in certain cases where the King's servants were parties, who being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron *Powell*, (speaking of the case of a borough court,) that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the Judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case, as in others, '*ignorantia facti excusat*.' Mr. Baron *Powell* lays down the same rule as to a party: but his opinion in that respect is disapproved of by Lord Chief Justice *Willes*, in *Moravia v. Sloper* (*Willes*, 35), but not so far as it relates to a Judge or officer."

The like rule has been followed in the case of magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to shew their want of jurisdiction; *Pike v. Carter* (c), *Lowther v. The*

(a) 2 *Lutw. App.* 1560, 1566.(b) 10 *Co.* 68 b.(c) 3 *Bing.* 78.

Earl of Radnor (a). It is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect, and it lies on the plaintiff in every such case to prove the fact; see also Serjt. *Williams'* note (1) to *Peacock v. Bell (b)*. In the case of *Carratt v. Morley (c)*, the Court of Queen's Bench entered the verdict against Commissioners who had given judgment against the plaintiff, over whom they had no jurisdiction, on the ground that it lay upon them to shew affirmatively that he was within their jurisdiction. The Court say, p. 28, "The doubt as to the Commissioners' liability arose from the possibility, as the case was undefended, that there might have been evidence to convince them that the defendant in that suit resided within their jurisdiction. Nothing of this sort, however, appears; nor can we be justified in inferring it from the mere fact that the Court acted in a manner which requires it to warrant their proceeding." This decision was subsequent to *Calder v. Halket (d)*, which, however, seems not to have been brought to the notice of the Court.

No question arises in the present case on whom the burthen of proof lies. If it did, we should be obliged to say, whether we followed the authority of *Calder v. Halket* or *Carratt v. Morley*, which on this point seem to be opposed to each other. As it is, we follow both cases in saying that, if the tribunal of limited authority acted on the evidence before them, no action lies. In *Calder v. Halket*, as also in the cases therein cited, of *Pike v. Carter (e)* and *Lowther v. The Earl of Radnor (a)*,

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(a) 8 *East*, 113.(b) 1 *Saund.* 74 d, 6th ed.

(c) 1 Q. B. 18.

(d) 3 *Moo. P. C.* 28.(e) 3 *Bing.* 78.

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it was enough for the decision of the case to say, that the action would not lie where it was not shewn that the Judge knew of the defect. The Court in each case guard themselves from saying that an action would not lie at common law, where the Judge had means of knowledge of which he ought to have availed himself, but they cannot be understood as deciding that the form of the action would be trespass. Indeed, in *Lowther v. The Earl of Radnor* (a), Lawrence J. says, p. 119, "If the magistrates made an order against the evidence laid before them, the party injured would have another sort of remedy against them," pointing, as I conceive, to an action on the case (b), in which malice and want of reasonable and probable cause would, even at common law, have been necessary averments. In addition to the cases cited in *Calder v. Halket* (c) I may refer to *Ackerley v. Parkinson* (d).

There are cases quite consistent with the above view where it has been held that an action of trespass lies where the Judge of the inferior tribunal, knowing the facts, mistakes the law, and thinks he has jurisdiction when he has not. Such was the case of *Houlden v. Smith* (e). There the mistake was not of fact, but of law, and on that ground it is distinguished in the judgment from those cases in which, say the Court, p. 852, "it was held that the question as to jurisdiction or no must" (that is for this purpose) "depend on the state of facts as they appeared to the magistrate."

I have, on this branch of the case, only further to observe, that before stat. 11 & 12 Vict. c. 44. th

(a) 8 East, 113.

(b) See *Burley v. Bethune*, 5 Taunt. 580.

(c) 3 Moo. P. C. 28.

(d) 3 M. & S. 411.

(e) 14 Q. B. 841.

defendants might have been in great technical difficulty, because, their order being quashed, they would have been deprived of the proper evidence of that which alone could justify their distress warrant. But if the real facts, whilst the order existed, were such as to give the justices so much jurisdiction that before stat. 11 & 12 Vict. c. 44. trespass would not have lain against them, they are not within the second section of that Act, and are within the first section; so that, whatever might have been the case at common law, I think it now essential to prove malice and want of reasonable and probable cause, that is, assuming the fact to be that the justices proceeded because they adjudged the dispute not to be *bonâ fide*. I think it would be otherwise if finding the dispute real they erroneously, in point of law, thought they might proceed because it was, in their opinion, frivolous, though *bonâ fide*.

For these reasons I think the defendants entitled, if they choose, to a new trial, but they are not bound to take a new trial. They may allow the verdict on not guilty to stand, preferring to make absolute that branch of the rule which seeks to enter the verdict for the defendants on the second plea, and also that branch of it which seeks to reduce the damages to 1*s*. If this alternative is adopted the plaintiffs will have the costs of the issue on not guilty, and may, if so advised, go into a Court of error to reverse the judgment pronounced in this Court on the demurrer in favour of the second plea, and so establish their right to the damages of 1*s*. It will be for the defendants and their advisers to consider in which way it is for their interest to have the rule made absolute—the Court has only to see that they have the right to elect between these alternatives, and

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I proceed to give my reasons for thinking that they are entitled in the alternative to make the rule absolute to this extent.

The important dates on this part of the case seem to be the following: The order was made upon the 6th *January*, 1859. The distress warrants were signed by the defendants upon the 3rd *February*, but they were not acted upon till the 14th *March*, on which day there was a seizure of the plaintiff's goods. On the 27th *April* the plaintiff obtained a rule nisi for a certiorari to quash the order, and on the 9th *May* the order was quashed. The action was commenced on the 13th *June*, being more than three months after the making of the orders, and the signing of the distress warrants, but less than three months after the actual seizure. The action was, therefore, too late as regards the making of the order and as regards the expense of quashing that order, assuming that these costs might have been recovered as special damage resulting from the making of the order. It is not to be inferred that the costs of quashing the order could be recovered as special damage. All I say is, that, even if they could, still, as to them, the action is too late. The seizure is in itself a cause of action, *Collins v. Rose* (a); and, as far as regards this cause of action, the defendants are not protected by the lapse of time. But the costs of quashing the order are in no sense part of the damage arising from the seizure; the plaintiffs might, in the replevin suit, shew the absence of jurisdiction just as well before the order was quashed as afterwards, and therefore the damages arising from the seizure were only the costs of replevying the goods, and any real damage sustained by being deprived of

(a) 5 M. & W. 194.

them. The costs of the replevin suit are certainly covered by the second plea, and the actual damage sustained by the seizure was merely nominal.

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The question, whether the judgment in replevin was a bar to a recovery of the damage for the seizure is upon the record, and must, in this Court, be considered as decided by the judgment on the demurrer to the plea, reported 1 *B. & S.* 658. On the trial, the only question was, whether that plea was proved, and the evidence given of an examined copy of the judgment of the County Court was sufficient proof of the substance of the plea. In my opinion, therefore, the defendants are entitled to elect, whether they will make the rule absolute for a new trial, or make it absolute to enter the verdict for them on the second plea, and to reduce the damages to 1*s.*

MELLOR J., after stating the facts on which the direction to the jury was given and that direction as set forth *ante*, pp. 621—623, proceeded:—As the propriety of my direction was the only point upon which we entertained any doubt, it is to that question alone I propose to address my observations.

It is with great doubt and hesitation that I differ from my learned brothers, but after much consideration I cannot come to the conclusion that my direction to the jury on the trial was wrong. The objection to it was, not that it was erroneous as far as it went, but that it was defective in not declaring to the jury that it was an essential ingredient in the cause of action that the defendants *malâ fide*, or maliciously, and without reasonable or probable cause, overruled and disregarded the objections urged by the plaintiffs to the validity of the rate, and proceeded to make their orders and issue their warrants

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notwithstanding the notice which they received. It was urged that a great distinction exists between applications to this Court to quash orders of justices under such circumstances when brought up by writ of certiorari, or in cases of prohibition or replevin, and actions against justices themselves. It is to be observed that the general jurisdiction over disputes as to church rates is vested in the Court Christian, and not in justices of the peace, and until the passing of the statute 53 G. 3. c. 127., considerable delay and expense were incurred in the recovery of church rates, which occasioned great hardship, not only on the churchwardens, but also to the parties liable to the rate; and the object of the Legislature, as said by Bayley J. in *Rex v. The Chapelwardens of Milnrow* (a), "was not to draw questionable cases *ad aliud examen*, but to provide a summary remedy in cases where the party did not dispute the obligation to pay. The Legislature never intended to deprive the party of his right to have the validity of the rate questioned in the proper forum." Accordingly the seventh section of the above statute, after providing for the convening before the justices of any one duly rated, &c., and refusing to pay any church rate, where the sum does not exceed 10*l*., and authorizing them to examine into the merits of the said complaint, provides "that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed." The language of this proviso is unusually clear and explicit,

(a) 5 M. & S. 248, 254, 255.

and its effect appears to have been fully described in the passage already cited from the judgment of *Bayley J.* in *Rex v. The Chapelwardens of Milnrow* (a), and again by Lord *Denman* in giving the judgment of the Court in *Ricketts v. Bodenham* (b): "This proviso applies only to cases under 10*l.*; and the effect of it is that, even in such cases, the moment it appears that the question is one not merely of *enforcing payment*, but touching the *validity* of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches."—The justices are by that statute invested with a very special and limited jurisdiction. The amount of the rate demanded must not exceed 10*l.*, and if the validity of such rate be disputed, or the liability of the person from whom it is demanded to pay the same be denied, and the party disputing the validity of the rate, or his liability, give notice thereof to the justices, they "shall forbear giving judgment thereupon." In the present case it must be taken to have been found by the jury, and as conclusively established, that the plaintiffs bonâ fide intended to dispute, and did dispute the validity of the rate in question, and did give notice thereof to the defendants, who, instead of forbearing to give judgment thereupon, proceeded to make their order and to issue their warrant to distrain for the amount.

The conditions which determine the special and limited jurisdiction of the justices are in terms found by the jury. It is, however, contended that I ought to have told the jury that the defendants were bound to inquire into and to satisfy themselves of the bona fides of the objections made by the plaintiffs to the validity of

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(a) 5 *M. & S.* 248. 254.(b) 4 *A. & E.* 433. 443.

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the rate, and that if, so doing, they without malice made a mistake, they would not be liable.

It is to be observed that the words "bona fides" are nowhere to be found in the statute, and it has never been judicially asserted that the justices have authority under it to decide upon the validity of the objections; on the contrary the decisions are that they have no such authority; *Rex v. The Chapelwardens of Mibrow* (a), *Dale v. Pollard* (b). Yet if this objection to my direction be well founded, they may without impeachment overrule and disregard even a perfectly valid objection to the rate, and give judgment against the party convened before them, and authorize his goods to be distrained, if they do it without malice and under the belief that the objection is not urged bonâ fide. Surely this is a startling result, and gives an extension to the authority of justices in such cases, limited, not by the conditions of the statute, but their own belief or disbelief in the bona fides of the objections made by the party disputing his liability or the validity of the rate.

Some inconvenience may no doubt flow from the strict construction of the statute, as it may enable parties more easily to evade the summary remedy given for the recovery of church rates. It must not, however, be forgotten that the only effect of the justices forbearing to proceed to judgment, in such a case, will be to remit the parties to the ordinary jurisdiction of the Courts Christian, and, if the justices too readily stay their hands, they may be set right by an application to this Court, and when acting under its directions they will incur no responsibility.

(a) 5 M. & S. 248.

(b) 10 Q. B. 504.

Some of the difficulties which beset this case appear to me to have arisen from an observation of Lord *Ellenborough*, in *Rex v. The Chapelwardens of Milnrow* (a), that perhaps, if a person was merely to say before the justices, that he disputed the rate, it would not be sufficient, inasmuch as he ought to shew something to manifest that he disputed it *bonâ fide*." These words of Lord *Ellenborough* are cited in the subsequent case of *Rex v. Wrottesley* (b), where a party, being convened before justices for non-payment of a church rate, appeared by his attorney, who on his behalf stated that he disputed the validity of the rate, and that for the purpose of trying it a caveat had been entered in the Ecclesiastical Court against the confirmation of any church rate for the parish of *Tisbury*; he therefore contended that the justices had no jurisdiction, but he did not say on what grounds the rate was objected to. Lord *Tenterden*, in making the rule absolute for a mandamus, said, p. 651, after referring to the state of the law:—"There is, therefore, no objection to the justices granting this complaint; whether ultimately they can go to judgment is a different question. A mandamus may issue commanding them to hear; when they have heard they will be able to say more of the case: but, at least, it will not come to this strange absurdity, that a man, by merely saying 'I dispute the validity of the rate,' shall put an end to the jurisdiction of the justices. If, upon the hearing, a party satisfies the justices that there is a *bonâ fide* intention to contest the rate, the proceedings before them will go no further." If the Legislature had intended it to be a condition that the party summoned before the justices should not only dispute the validity of the rate, but should also satisfy the justices that he *bonâ fide* intended

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(a) 5 M. & S. 248. 253.

(b) 1 B. & Ad. 648.

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to contest its validity, it would have been very easy to have said so; and it is to be observed that in the statute 5 & 6 W. 4. c. 74. s. 1., being "An Act for the more easy recovery of tithes," it is expressly provided that that Act shall not extend to any case in which the actual title to any tithe, &c., or the actual liability or exemption of any property, shall be *bonâ fide* in question. Whether Lord *Tenterden* ever contemplated such a state of facts as has now arisen may be very questionable, and, construing the expression as to satisfying the justices by the actual facts of that case and by the other parts of his judgment, it would rather seem that he intended only to decide that the justices had stayed their hands too soon, inasmuch as no grounds whatever had been proved or even stated as affecting the validity of the rate. In *Reg. v. Colling (a) Coleridge J.* is reported to have said, p. 828, I do not agree that "they" (the justices) "were conclusively judges whether or not the rate was disputed *bonâ fide*. It would still be for a jury to decide that point, if the matter came before them. And, if the only reason to doubt the good faith was the nature of the objections, I should think a jury ought to say that the opposition was *bonâ fide*;" and *Wightman J.*, in the same case, observed, p. 825, "Many objections are taken which are not tenable, where there is no reason to assume want of good faith." In *Reg. v. Nunneley (b)* the justices, in their affidavit in opposition to the rule for a *certiorari*, expressly stated that they had determined that the objections were not made in good faith, but were made and put forward as a pretext merely for avoiding the payment of the rate; but Lord *Campbell* repeated,

(a) 17 Q. B. 816.

(b) E. B. & E. 852.

859, with approbation, the passage already cited from the judgment of *Coleridge J.*, in *Rex v. Colling*, and further on his judgment said, "To shew the want of jurisdiction evidence was given which was uncontradicted: but the justices, by a capricious decision, though, it may be, on motives highly honourable, choose to say that they do not believe that the objection was taken *bonâ fide*." *Coleridge J.*, p. 861, cited and adopted a passage from the judgment of the Court of Exchequer Chamber in *Bunbury Fuller (a)* as follows, "It is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends." *Coleridge J.* said, p. 860, "Although the jurisdiction is not opposed by an objection, for instance, that the rate was made on *Friday*, yet, on the other hand, when the objection is reasonable they are not entitled to say that they choose to disbelieve the *bona fides*. Nothing like that will be found in the spirit of any decision which has taken place." And *Crompton J.*, in the same case, said, p. 861-862, "This is a case where, if a particular circumstance occurs, the jurisdiction of the justices is entirely gone: it is quite different from cases where the fact which gives jurisdiction is itself an ingredient in the judgment which is to be given if there be jurisdiction, in cases as *Reg. v. Dayman (b)*, for instance, where the magistrate, if he had jurisdiction, would still have to decide whether the place in question was a new street." In the present case the particular circumstances are expressly found by the jury upon the occurrence of which the jurisdiction was entirely gone.

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(a) 9 *Exch.* 111. 140.(b) 7 *E. & B.* 672.

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It is however said that, although an order may be quashed on certiorari for want of jurisdiction, it by no means follows that an action may be maintained against the justices who made it, and that such a result is prevented either by the operation of the statute 11 & 12 Vict. c. 44. s. 1., or by the principles of the common law. If the defendants can, after the finding of the jury, be considered as having acted in the execution of their duty in proceeding to judgment and overruling the objections of the plaintiffs, they would doubtless be within the protection of the statute, unless malice, and the want of reasonable and probable cause, could be averred and proved, and no action would lie against them ; or if they can be brought within the rule laid down by *Parke B.*, in delivering the judgment of the Judicial Committee of the Privy Council in *Calder v. Hall* (a), in which he said, " It is well settled that a Judge of a Court of Record in *England*, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction." For instance, if a justice having a limited jurisdiction is deceived by some false assertion of a fact which if true gives him authority, but which not being true his jurisdiction fails, he would not be liable to an action of trespass for having been deceived ; and for a bona fide mistake in a matter within his jurisdiction no action would lie : *Ackerley v. Parkinson* (b) *Lowther v. The Earl of Radnor* (c). The defendants in the present case had,

(a) 3 Moo. P. C. C. 28. 77.

(b) 3 M. & S. 411.

(c) 8 East, 113.

at the time they made the orders, the knowledge of all the facts which were afterwards proved before the jury on a trial. Yet, instead of forbearing to proceed to judgment, as soon as it appeared that the defendants not only objected to the rate but stated and proved, in point of fact, the grounds of their objections, they, doubtless believing that they were the judges of the objections, determined to overrule them. They cannot therefore say that they had not the knowledge or means of knowledge of which they ought to have availed themselves that which constituted the defect of their jurisdiction. They were in mistake of law, *Houlden v. Smith (a)*, *Watson v. Bodell (b)*, that they acted in deciding against the validity of the objections made by the plaintiffs, and they could not give themselves jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of their jurisdiction depended.

The case, therefore, falls within the second section of the statute for protection of justices, and not within the first; and, the orders having been brought up and quashed by this Court, it appears to me that the defendants, who made them and authorized the distress under them, are liable in this action, and that my direction to the jury is correct.

The hardship upon justices, resulting from their liability to an action, was strongly insisted upon before me; but I think that the answer to that observation is twofold. If objections are made and proved before the justices they may forbear to proceed; and if overruled by this Court to do so, they will be protected:

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(a) 14 Q. B. 841. 852.

(b) 14 M. & W. 57.

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and in the next place, before an action can be commenced against them the order must be quashed by this Court on certiorari. And I would further observe that there is a manifest inconvenience in multiplying the occasions on which it is necessary to put to the jury the question whether justices have acted maliciously, and without reasonable or probable cause, in the execution of their office. I have therefore come to the conclusion that the rule, so far as it regards the new trial and the entry of the verdict for the defendants, ought to be discharged ~~=~~ but that, on the ground urged at the trial, the rule must ~~=~~ be made absolute for reducing the damages to 1s.

In the following *Easter* Term (*April* 20th) the Court, consisting of BLACKBURN and MELLOR JJ., CROMPTON J. also being present, said that WIGHTMAN J., who ~~had~~ expressed his opinion only on the point of misdirection, agreed with them in disposing of the rest of the rule.

Afterwards the defendants elected to have a new trial and the rule was made absolute accordingly.

The plaintiffs gave notice of appeal.

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HYDE *against* PALMER.Monday,
February 9th.

action for the infringement of a patent taken out in 1849, the plaintiff, in support of a plea that the invention was not new, gave evidence that *O.*, who was dead, had in 1846 used a process identical with that in the patent. On the cross-examination of the witnesses it appeared that, if *O.* used the invention and sold the product before the patent, it was only in very small quantities, and that it was not brought into general use; and one of the witnesses was asked in examination whether *O.* had not sold some of the product to *S.*, and he had. The plaintiff in reply called *S.*, who gave evidence that in 1850 or 1851 *O.* sold him a small quantity of the product, and at the time of the sale said that it was a new article, that he did not know it to be publicly known, and he would sell him all he could manufacture. Held, that evidence of what *O.* said at the time of that sale was admissible in reply, as it would not have been admissible in an issue whether *O.*, before 1849, used the invention.

Patent.
Prior user.
Declaration.
Evidence in
reply.

DECLARATION by the plaintiff, assignee of *John Barsham*, for the infringement of a patent for improvements in separating the fibres from cocoa nut shells, "dated the 26th April, 1849.

Verdict, among others: First, Not guilty. Second, that *Barsham* was not the first inventor. Third, that the invention was not a new manufacture.

Verdict thereon.

The cause was tried, before *Blackburn J.*, at the *London* Assizes after *Hilary* Term, 1862, when the jury found verdict for the plaintiff, damages 40*s.*, leave being granted to move to enter it for the defendant, on the ground that the invention was not a new manufacture, and could not be made the subject of a valid patent in England.

One of the objections stated in the defendant's petition was, that the invention, and the several parts of it respectively, were, prior to the date of the

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letters patent, used and published by the manufacture of articles according to the same invention and the several parts respectively, and by the sale and use of articles so manufactured by (among other persons) *Robert Oatley*, at *Colchester Street, Whitechapel*.

In *Easter Term*,

Hindmarch obtained a rule nisi in pursuance of leave reserved, or for a new trial, on the grounds, First, that the invention was not a new manufacture, citing *Brook v. Aston* (a); Second, that evidence was received which ought to have been rejected; Third, misdirection with regard to the construction of the specification; and Fourth, that the verdict was against the evidence.

The point as to the reception of improper evidence is the only material one; and the facts on which it arose, as well as the arguments of counsel, appear sufficiently in the judgment of the Court.

In this Vacation, *February 3d*, before *Blackburn and Mellor JJ.*,

Grove and *T. Aston* shewed cause; and

Hindmarch (*Rosher* with him) supported the rule.

Adjournatur.

BLACKBURN J. (*Feb. 9th*) delivered the judgment of the Court.

In this case we think that we need not hear any further argument in support of the rule, as we are agreed that it must be made absolute for a new trial on the ground of the improper reception of evidence.

(a) 8 E. & B. 478, affirmed on appeal 28 L. J. Q. B. 175; 5 Jur. N. & 1025.

The patent, for the infringement of which the plaintiff sues was taken out in 1849. The defendant, amongst other objections, contended that the patent was invalid on account of prior user by one *Robert Oatley*, who at the time of the trial was dead, and he called witnesses who gave evidence which, if believed, shewed that *Robert Oatley* had, at least as early as 1846, used a process identical with that in the patent, and had for some years by that means produced and sold fibre exactly similar to that produced by the plaintiff's patent. The cross-examination of these witnesses was directed partly to discredit them and partly to shew that, even by their own account, *Oatley* did not go farther than make experiments, and it was successfully shewn that if *Oatley* did before the date of the patent use this invention and sell the product, it was only in very small quantities and was not brought into general use. One of the witnesses who deposed to sales by *Oatley* to himself of small quantities of this fibre, was asked on cross-examination whether *Oatley* had not sold some of the fibre to *Augustus Smith*, and he said he had; but no question on this subject had been asked by the plaintiff's counsel, and this answer was in no way brought out by them or made part of their case.

The plaintiff called witnesses to give evidence in reply, and amongst others *Augustus Smith*, who gave evidence that about the end of 1850, or the beginning of 1851 (and therefore after the date of the patent in question, and five or six years after the date of the alleged acts of user relied on by the defendant), *Oatley*, for the first and only time, sold him about 3 lbs. weight of the fibre. A question was then proposed to be asked as to what *Oatley* said when offering the fibre for sale. It

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was objected to by Mr. *Hindmarch*, but Mr. *Grove* pressed the question, contending that the answers would shew that *Oatley's* act was at this time secret, and that would make the evidence admissible; as the act of *Oatley* after the patent was taken out, if shewn to be secret, would raise an inference that his prior user could not have been of such a nature as to defeat the patent. With this view I permitted the question to be put, and the witness answered that *Oatley* said that it was a new article, that he did not wish it to be publicly known, and he would sell the witness all he could manufacture.

It was then proposed to ask questions as to what *Oatley* had said at the trial of a former action on this patent, not between the same parties; but those I rejected.

It is clear that, if the jury thought that *Oatley* in his lifetime had stated that he had not made the invention attributed to him by the defendant's witnesses, that statement might have weighed with them, so that if the evidence was improperly admitted the defendant is entitled to a new trial. The conduct of a cause may be such that the one party by inquiring into a matter may entitle the other party to prove the inquiry, and this evidence, not in itself admissible in chief, may become admissible in reply: such was the case in *Perkins v. Vaughan* (a). But then, to justify the reception of evidence on this ground, the other side must have entered upon the inquiry; it cannot be rendered admissible merely because the party adducing it has previously himself made some inquiries into the subject, not followed up by the other side. The evidence therefore, in the present case, was not admissible in reply unless it

(a) 4 M. & G. 988.

would have been admissible in chief on an issue whether *Oatley* did, before 1849, use the patented invention.

It was said that the evidence of what *Oatley* said was admissible as accompanying and explaining his act in selling to *Smith*, and it is no doubt true, as is said in 1 *Phillipps on Evidence*, 152, 10th ed., words and declarations are properly admissible when they accompany some act, *the nature, object or motives of which are the subject of the inquiry*. But in the present case, as was truly said by Mr. *Hindmarch* in his argument, neither the nature, object nor motives of *Oatley*, when selling this fibre in 1851, were in any way the subject of the inquiry: that was limited to the acts prior to the patent; and what was said by *Oatley* in 1851 was important, not as explaining his then sale, but as amounting to a statement by him that he had not previously known of the article. Had he himself been a party to the cause, that would have been admissible and weighty evidence. He not being a party to the cause, and the case not falling within any of the exceptions by which hearsay of statements of deceased persons is made admissible, we think that this evidence was improperly received, and that there must be a new trial.

Rule absolute.

Feb. 10. *T. Aston* applied on behalf of the plaintiff for leave to appeal.

Application refused.

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Saturday,
February 14th.

The QUEEN *against* The Overseers of BELFORD.

Settlement
by estate.
9 G. 1. c. 7.
s. 5.
Payment.

A. agreed with *B.* to build a house according to certain specifications on land then belonging to *B.*, in consideration of which undertaking, and of an annual rent charge of 25*s.*, a lease of the land for three lives was to be granted. The house was built by *A.* according to the specifications, at the cost of 85*l.*, whereupon the lease was granted; the grant of the rent charge and the erection of the house on the land conveyed being together of the pecuniary value to the grantor at the time of the conveyance of more than 30*l.* Held, that *A.* hereby acquired a settlement under 9 G. 1. c. 7. *s. 5.*

AT the Quarter Sessions of the borough of *Berwick-upon-Tweed*, holden in *April*, 1862, an order for the removal of *Elizabeth Silver*, widow, and her two children, from the parish of *Berwick-upon-Tweed* to the parish of *Belford*, in the county of *Northumberland*, having been appealed against, was confirmed subject to the following case.

"In or about A. D. 1831, one *James Ternent* agreed with one *William Clark* to build a house, according to certain specifications, on land then belonging to the said *William Clark* in the appellants' township, in consideration of which undertaking, and of an annual rent charge of 25*s.*, a lease of the land for three lives was to be granted. The house was built by *James Ternent* according to the specifications at the cost of 85*l.*, whereupon the lease was granted. These facts appeared on the trial; and also as the Recorder found that the grant of the rent charge and the erection of the house on the land conveyed were together of the pecuniary value to the grantor at the time of the conveyance of more than 30*l.*, the Recorder confirmed the order."

On the argument of the case before this Court, it was stated that the settlement relied on was a derivative settlement from the father of the pauper.

The question for this Court was, whether or not under the above circumstances there was such a consideration *bonâ fide* paid as to satisfy the requirements of 9 *G. 1. c. 7. s. 5.* If the Court should be of opinion that there was, then the order of Sessions was to be confirmed. If the Court should be of opinion that there was not, then the order of Sessions was to be quashed.

Liddell and Robinson Fowler, for the respondents.—The question turns on stat. 9 *G. 1. c. 7. s. 5.*, which enacts, “No person or persons shall be deemed, adjudged or taken, to acquire or gain any settlement in any parish or place, for or by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.*, *bonâ fide* paid, for any longer or further time than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled, before the said purchase and inhabitancy therein.” The consideration for the purchase of this house was *bonâ fide paid* within the meaning of this section. Its object was to prevent poor persons from coming into a parish and obtaining fictitious settlements by estate: and therefore it is that holding land by donation will not suffice; *Rex v. The Inhabitants of St. Mary, Whitechapel* (a), *Rex v. The Inhabitants of Marwood* (b). Here the party received a lease in consideration

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The QUEEN
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(a) *Burr. S. C.* 55.(b) *Burr. S. C.* 386.

1863. of his building a house, which cost him 85*l*. If, after the house was built, the other party refused to grant a lease, and an action were brought against him, the measure of damage would be the value of the lease, and as such necessarily exceeding 30*l*. It is not necessary that the consideration be paid to the lessor, nor that it be paid in actual coin to any one, so long as it is either money or money's worth. Payment to take a case out of the Statute of Limitations need not be in actual money. [*Wightman J.* Building a house is more like accommodation and satisfaction than payment.] *The Overseers of Wendron v. The Overseers of Stithians* (a) is, by implication, an authority almost in point. There a party took premises of another at a yearly rent of 1*l*. 11*s*. 6*d*., entered into occupation, and erected buildings on them at an expense of less than 30*l*. Afterwards the parties executed an indenture witnessing that in consideration of the yearly rent reserved, and of the covenants on the part of the lessee, the lessor granted and leased the premises to him, in consideration of having erected the buildings for the joint benefit of himself and the lessee of other premises, to hold for successive terms of six years till the expiration of ninety-six years, if three persons named, or either of them, should so long live, and for three years further; and it was held that the lessee did not gain a settlement by estate by occupying under that lease, for no consideration otherwise than pecuniary was shewn, and therefore, 30*l*. not having been paid for the purchase, stat. 9 *G. 1. c. 7. s. 5.* prevented a settlement being gained. [*Mellor J.* In *Re v. The Inhabitants of Tedford* (b) the purchaser paid 9*l*.

(a) 4 *E. & B.* 147.(b) *Burr. S. C.* 57.

of the purchase money, and the residue, being 30*l.*, was paid by his order, whereupon he mortgaged the premises to the man by whom the residue was paid, who afterwards entered by virtue of the mortgage, and this was held a bonâ fide payment to satisfy the statute: and that case is supported by *Rex v. The Inhabitants of Chailey* (a). *Wightman J.* In *Rex v. The Inhabitants of Tedford* the money was paid.] In *Rex v. The Inhabitants of Stockland* (b) it was held that giving up a mortgage and other debts was sufficient. [*Mellor J.* In *Rex v. The Inhabitants of Dunchurch* (c), where the original purchase money was less than 20*l.*, subsequent improvements effected by the tenant to the amount of 15*l.* more were held insufficient. That also seems, by implication, an authority in your favour.] There is a case cited there from *Foley* (d), of *St. Paul's Walden* and *Kimpton*, where the fine and Court fees advanced by churchwardens were added to the purchase money to make up the 30*l.*, and this was held sufficient. A contrary doctrine would lead to this absurdity, that if a man were to exchange his estate in parish *A.* against the estate of another in parish *B.*, as no money passed between them neither could gain a settlement under his newly acquired estate. [They were then stopped.]

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Manisty and *G. Bruce*, contra.—The object of the statute was as stated on the other side; but the expression, that the consideration shall be “bonâ fide paid,” is understood to mean payment in its fair and ordinary sense. Thus it has been held that a conveyance for

(a) 6 *T. R.* 755.(b) *Burr. S. C.* 169.(c) *Burr. S. C.* 553.(d) The reference should be *Saint Paul's Walden v. Kempton, Foley's Poor Laws*, 238, 3rd ed.

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natural love and affection is not a purchase within the statute; *Rex v. The Inhabitants of Lydlinch (a)*: and that the money must be paid to the vendor at the time of the purchase; so that where 12*l.* of the purchase money was paid down and the rest secured by mortgage on the property, this was held not sufficient to satisfy the statute; *Rex v. The Inhabitants of Olney (b)*. Here, when the man has acquired that which is relied on to give him a settlement, he may have made himself a pauper by the very act of acquiring it. [*Wightman J.* In any case the payment of the 30*l.* might at once make the man a pauper.] There is nothing here to shew that the house when built was alone worth 30*l.*, for the rent charge was part of the consideration for the lease.

WIGHTMAN J. I should have been better satisfied if the case were more explicitly stated, but giving the best construction I can to the language of stat. 7 *G. 1. c. 7. s. 5.*, I think that this man gained a settlement.

The agreement was that, in consideration that he would build a house according to certain specifications, the landlord would grant him a lease for three lives at an annual rent of 25*s.*: he did, in pursuance of that arrangement, build a house according to the specifications at the cost of 85*l.*, and for doing this the landlord granted him a lease accordingly. The consideration was the building a house that cost 85*l.*, and therefore, unless to satisfy the statute nothing but pecuniary consideration in the strict sense of the word will suffice, and money value is not enough, our judgment must be for the respondents. The decision which

(a) 4 *B. & Ad.* 150.

(b) 1 *M. & S.* 387.

seems most in point is *The Overseers of Wendron v. The Overseers of Stithians (a)*, which was in effect that, if the value of 30*l.* had there been paid for the purchase of the lease, the statute would apply, if not it would not; and, the only question appears to have been had there been a payment either pecuniary, or by what was equivalent to pecuniary, or was the consideration for the lease mere love and affection. It was taken for granted there that an equivalent to money would have sufficed; and may not the building the house in this case, at the expense of 85*l.*, be fairly taken as an equivalent to that sum? Some little difficulty arises here from the case not stating what was the pecuniary value of the house to be built, for it is contended that the rent charge was part of the consideration; but, taking the whole together, it must be understood that 85*l.* was to be expended upon it whether it were worth that sum or not, and if so, the consideration was to an amount exceeding the 30*l.* required by the statute.

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MELLOR J. (The only other Judge present.) The facts of this case are not quite in accordance with any other cited. But, on the principle laid down in *The Overseers of Wendron v. The Overseers of Stithians (a)*, it must be taken for granted, that if the facts there had shewn that the money expended on the alteration of the house before the lease exceeded 30*l.*, the Court would have held it was a sufficient pecuniary consideration. Very early in the case Lord *Campbell* says, pp. 151-2, "Here we have no consideration of natural affection, nor any other, except the improvement of the property;

(a) 4 E. & B. 147.

1868. and that is not to the extent of 30*l.*;" and *Erle J.*
The QUEEN says, p. 152, "Stat. 13 & 14 *Car.* 2. c. 12. s. 1. gives the
v. power of removing such persons as come to settle 'in any
Overscers of tenement under the yearly value of 10*l.*': that seems
BELFORD. therefore to have been the limit of value originally con-
templated as conferring a settlement." Now no money
was *paid* here, but I understand the agreement to have
been, "if you will build a house according to certain
specifications, I will grant you a lease for three lives at a
certain rent." The house is then built at a cost of
85*l.*, and, in the absence of any finding to the contrary,
we must take it for granted that 85*l.* was expended in
building it, and consequently that this man either had
that sum, which far exceeds the 30*l.* required by the
statute, or that he could get credit for it. Therefore,
although I agree that we ought not to extend the con-
struction of this statute beyond what is reasonable, I
think we are here acting both within principle and the
authority of the cases cited.

Order of Sessions confirmed.

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BURGES and another *against* WICKHAM and
another.

Saturday,
February 21st.

*Marine in-
surance.
Warranty.
Seaworthiness.
Extrinsic
evidence.*

Declaration on a policy by which the plaintiffs were assured "at and from all or any ports and places in the *Clyde*, or from *Liverpool*, to *Kurrachee* or *Calcutta*, and for the space of thirty days after her arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called *The Ganges*, a steamer." There were pleas of unseaworthiness and of undue concealment, on which issues were joined. *The Ganges* was built for navigating the *Indus*, and was on this account of such a construction as to be unfit generally for ocean navigation. Every thing however was one that possibly could be done by temporary appliances to render a vessel of her construction as strong as she could be made to encounter the perils of the voyage insured. The assured had, before the policy was entered into, informed the defendants of the original construction and character of *The Ganges*, telling them at the same time that the additional strengthening contemplated was then in progress, and that every thing possible would be done to strengthen and fit her for the voyage. An additional premium was paid commensurate to the increased risk arising from the character of the vessel.

1. Held, that the warranty of seaworthiness must be taken to be limited to the capacity of the vessel, and therefore was satisfied if, at the commencement of the risk, the vessel was made as seaworthy as she was capable of being made: though it might not make her as fit for the voyage as would have been usual and proper if the adventure had been that of sending out an ordinary sea-going vessel.

2. That extrinsic evidence as to the character of the vessel was inadmissible.

THE first count of the declaration set out a policy in the ordinary form, dated May 4th, 1860, and executed by the defendants, two of the directors of *The Victoria Fire and Marine Insurance Company*, by which the plaintiffs were assured "at and from all or any ports and places in the *Clyde*, or from *Liverpool*, to *Kurrachee* or *Calcutta*, and for the space of thirty days after her arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called *The Ganges*, a steamer," for the sum of 4000*l.*; the consideration for the said assurance being at and after the rate of five guineas per cent. It then proceeded to

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allege that *The Oriental Inland Steam Company (Limited)* were the owners of the ship and the machinery thereof, and interested in the subject-matter of the insurance in the policy mentioned, and that the insurance was made for the use and benefit and on account of the last-mentioned Company, and that, before and at the time of the making of the policy, the first mentioned Company and the defendants had due notice and knowledge of the particular construction of the ship and of the purpose for which the same was built and intended, to wit, for the purpose of being used and employed in river navigation in parts beyond the seas, to wit, in the *East Indies*. It then averred a total loss by perils of the seas; and that all things happened to entitle the plaintiffs to be paid the sum of 4000*l.*, yet the plaintiffs had not been paid the same.

The second count alleged that the ship or vessel thereafter mentioned having been built for the purpose of river navigation only, to wit, river navigation in parts beyond the seas, the plaintiffs before, and at the time of the making of the policy of insurance thereafter mentioned, informed and gave notice to the defendants of the purpose for which the vessel was constructed, and thereupon in consideration thereof the plaintiffs, at the request of the defendants, would pay to the defendants, for the insurance of the vessel upon the voyage thereafter mentioned, a rate of premium greatly exceeding the then current rate of premium for the insurance of a seaworthy vessel upon such voyage, to wit, the rate of premium thereafter mentioned, the defendants, being members and directors of the Company thereafter mentioned, to wit, on the 4th May, 1860, contracted and agreed that the said Company should insure the vessel notwithstanding that,

reason of her build, she might not be seaworthy for a voyage, and accordingly signed and sealed with their respective seals a certain deed poll or policy of insurance, and which was made on the basis of the information and notice so given to the defendants and of the agreement as aforesaid. It then proceeded to set out the policy; and concluded with similar allegations to those in the first count as to interest and loss.

There were also counts for money received and on counts stated. Claim 4500*l*.

The pleas were:

First. To the first count. That the ship, at the commencement of the risk in the policy, was not seaworthy for the voyage.

Second. To the same. That *The Victoria Fire and Marine Insurance Company* had not nor had the defendants notice or knowledge of the particular construction of the ship, and that the construction was material to the loss, and was material to the loss of the policy.

Third. To the same. That the loss of the ship with her machinery was not occasioned by the perils of the sea.

Fourth. To the same. That the defendants were induced to subscribe the policy, and to become insurers, by the misrepresentation made by the plaintiffs to the defendants of certain facts then material to the loss, and material to the loss of the policy, that is to say, by the misrepresentation that the ship was seaworthy and that she was fitted to perform the voyage, and that the ship was of the ordinary build and construction of steam vessels, and that other vessels of similar build and construction belonged to *The Oriental Inland Steam Company*

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had performed the voyage in safety, whereas the ship was not seaworthy or fit to perform the voyage, and she was not of the ordinary build and construction of steam vessels, and whereas other vessels of a similar build and construction and belonging to *The Oriental Inland Steam Company* had not performed the voyage in safety; all which premises the plaintiffs well knew.

Fifth. To the same. That at the time of making the policy the plaintiffs omitted to inform the defendants of a fact then material to the risk of the policy and then material to be known to the defendants, that is to say, that the ship was of peculiar and extraordinary build and construction, which rendered her unseaworthy and unfit to perform the voyage, as the plaintiffs well knew, but of which *The Victoria Fire and Marine Insurance Company* and the defendants were ignorant.

Sixth. To the second count. That the defendants had not notice of the purpose for which the ship was constructed, and that they did not contract or agree that the Company should insure the ship notwithstanding that, by reason of the build, she might not be seaworthy for the voyage, nor was the policy of insurance made on the basis of the information and notice or of the agreement; and that the ship, at the commencement of the risk in the policy mentioned, was not seaworthy for the voyage.

Seventh. To the same. That the ship, at the commencement of the risk in the policy mentioned, was not seaworthy for the voyage, by reason of her peculiar build and construction, and not by reason of her having been built for river navigation only.

Eighth. To the same. That the ship, with her machinery, was not lost by the perils or dangers of the sea.

Ninth. To the same. Similar to the fourth plea.

Tenth. To the same. Similar to the fifth plea.

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Eleventh. To the residue of the declaration. Never indebted.

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Issues were joined on all the pleas.

On the trial, before *Cockburn C. J.*, at the Sittings at *Guildhall* after *Trinity Term*, 1861, it appeared that *The Oriental Inland Steam Company, Limited*, the owners of the steamer *Ganges*, through the medium of the plaintiffs as their brokers, effected with the defendants, directors of *The Victoria Fire and Marine Insurance Company*, the policy of insurance set forth in the declaration upon the steamer *Ganges* and her machinery, valued at 16,000*l.*, and that the action was brought to recover 4000*l.* the amount insured and interest in respect of a total loss. The steamer *Ganges* had never been at sea before the voyage in question. She was an iron steam vessel, of 500 tons, about 240 feet in length and 30 feet in breadth, being a common proportion of breadth to length, flat bottomed, and, as originally constructed, drawing only 2 feet 6 inches of water; and was built in this country for *The Oriental Inland Steam Company, Limited*, and intended for the purpose of navigating the river *Indus*, and not for the purpose of ordinary ocean navigation. In several previous instances vessels of a construction in most respects similar to that of *The Ganges*, built in this country, and intended for river navigation abroad, had been enabled, by means of additional temporary strengthening, to perform ocean voyages with safety to the various rivers for the navigation of which they were built. The directors of *The Oriental Inland Steam Company, Limited*, who had previously sent out two of their vessels in pieces on board of sea-going ships, determined to send the steamer *Ganges* on the voyage to *Kurrachee*, after having first temporarily strengthened

1863. and fitted her as far as possible for the voyage, with a view to her being employed afterwards upon the river *Indus* in the condition in which she was originally built. At the time of effecting the policy *The Ganges* was at *Liverpool*, and the defendants' clerk, who was authorized to underwrite policies for them in *London*, and who underwrote the policy in question, was informed by the plaintiffs that the steamer was intended for navigating the river *Indus*, and would not therefore draw much water, that the additional strengthening contemplated was then in progress, and that everything possible would be done to strengthen and fit her for the voyage, and that her draught of water for the ocean voyage would be about 8 feet. The current rate of premium at that date, for a similar insurance upon ordinary sea-going steam vessels upon the said voyage, was from 35*s.* to 40*s.*, and the increased premium of 5*l.* 5*s.* was required by the defendants, and paid to them, in consideration of the vessel having been built for river navigation. *The Ganges* sailed from *Liverpool* on the said voyage on the 12th *June*, 1860, and, after having touched at and sailed again from *Lisbon*, foundered at sea in a heavy gale of wind on the 29th *July*, 1860. Before *The Ganges* sailed from *Liverpool* upon the voyage she was fitted with a substantial temporary keel and barge ends and other appliances which increased her draught of water for the ocean voyage to 8 feet, and she was strengthened by means of trussings and various contrivances, and everything was done that could possibly be done, at a great expence, to fit her to encounter the risks and perils of the voyage, and she was at the time of sailing as seaworthy for the voyage as it was possible to render a vessel of her class and peculiar build and construction. The counsel for the defendants contended that, under the circumstances, there had been no suffi-

cient compliance with the warranty of seaworthiness to be implied from the insurance, and that there had been misrepresentation and a concealment sufficient to avoid the policy.

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The Lord Chief Justice left to the jury the question whether there had been any misrepresentation or concealment on the part of the plaintiffs, and directed them that, if there had been no misrepresentation or concealment, it was a sufficient compliance with any warranty of seaworthiness to be implied under the circumstances from the insurance if *The Ganges* at the time of sailing had been made as seaworthy and as reasonably fit for the voyage as such a vessel could be made. The jury found that there had been no misrepresentation or concealment on the part of the plaintiffs, and gave a verdict for the plaintiffs for the amount claimed.

In *Michaelmas* Term, 1861,

Bovill obtained a rule nisi for a new trial, on the ground that the vessel ought to have been seaworthy and reasonably fit for the voyage, and that the Lord Chief Justice ought so to have ruled at the trial; and that it was not sufficient that the vessel should have been made as seaworthy and as reasonably fit for the voyage as such a vessel could be made, and that the Lord Chief Justice ought not so to have ruled and directed the jury.

In *Trinity* Term, 1862, *May* 28th, 29th,

Lush, *Honyman* and *Archibald* shewed cause.—“Seaworthiness” is a relative term, the import of which varies with the class of the ship, as well as with its situation, and the nature of the voyage and of the cargo; *Foley v. Labor* (a), per *Erle* C. J. In *Knill v. Hooper* (b) *Wat-*

(a) 2 F. & F. 663, 671, 672.

(b) 2 H. & N. 277, 283, 284.

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son B., delivering the judgment of the Court, said:—
 “It was asked, What amount of seaworthiness is required, and to what extent are the assured to go in repairs? Our answer is, that the term ‘seaworthiness’ is a relative term: there is no positive condition of the vessel recognised by the law to satisfy the warranty of seaworthiness.” And where the underwriter takes upon himself the insurance of an exceptional vessel, whether in consideration of a higher premium than usual or not, he cannot require more from the assured than that the vessel should be as seaworthy, that is, as reasonably fitted for the voyage, as vessels of that particular construction can be made. What *Lawrence J.* said in *Christie v. Secretan* (a), as to the obligation of the underwriter failing if the ship be incapable of performing her voyage, does not apply where the underwriter knows he is insuring an exceptional vessel not fitted for ordinary perils. *Parfitt v. Thompson* (b) shews that the underwriters are liable upon a policy in which they have agreed to consider a ship as seaworthy, though it be of a size unfit for the voyage insured. The seaworthiness or capability of a ship for performing her voyage is to be tested by comparing it with other ships of the same size and tonnage. A vessel may be seaworthy for a shorter but not for a longer voyage, though the same tract of ocean may in each case be traversed. The warranty of seaworthiness being implied from the nature of the contract, it is impossible to imply an incident at variance with or destructive of the particular contract itself. One of the grounds on which it was held in *Small v. Gibson* (c), by the Exchequer Chamber and the House of Lords, reversing the judgment of the Queen’s Bench, that there was n

(a) 8 T. R. 192. 198.

(b) 13 M. & W. 302.

(c) 16 Q. B. 128. 141. 157—160; 4 H. L. 353. 405. 411.

warranty of seaworthiness in time policies, was that it was unreasonable to imply it. [They cited the observations of Lord *Ellenborough* in *Simeon v. Bazett* (a).] The warranty ordinarily implied has reference only to sea-going vessels: here the vessel was insured for a sea voyage, but the basis of the contract is that the vessel was not so fit to encounter the perils of the seas as a sea-going vessel.

The evidence shewing that the contract between the parties was for the insurance of a river steamer does not contradict the policy, because the term "seaworthy", as has been shewn, is a relative term, the import of which varies with the class of ship as well as other things, and the perils of the seas intended to be insured against are those applicable to the particular ship.

Bovill and *Macnamara*, contra.—The meaning of "seaworthiness" implied in a policy of insurance is that the vessel is fit for and able in all respects to encounter the perils of the voyage insured. The word expresses the minimum degree of capability of performing the voyage which the vessel must have. The policy only covers such risks as are extraordinary, and therefore, if a vessel is not fit to encounter the ordinary risks, it is not insured. In *Paterson v. Harris* (b), *Cockburn* C. J., delivering the judgment of the Court, said "The purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things." If this were not so a man might send a wherry to *America*, and recover on his insurance. The term "seaworthy" is relative only to the nature and time of the voyage and the place where the vessel may be; but the

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(a) 2 M. & S. 94, 98, 99.

(b) 1 B. & S. 336, 339.

of the term is stated in any of the text book
 to the voyage insured. [They cited *Marshall
 Insurance*, 4th ed., by Serjt. *Shee*, ch. v. s.
 which *Cockburn* C. J. designated "a most ex-
 tention;" 1 *Park on Insurance*, 8th ed., by *Hildy*
 p. 458; *Abbott on Shipping*, by Serjt. *Shee*,
 8th ed. 340, 10th ed. 255; 1 *Arnould on Insu*
 ed. s. 257. pp. 713—714; and *Blackburn J. r*
 1 *Arnould on Insurance*, s. 256, pp. 712—713.]
 the term been qualified in any of the cases. [*Lord
 Ellenborough* in *Wedderburn v. Bell* (*a*); *Parke* B.
rence J. in *Christie v. Secretan* (*b*); *Parke* B.
 ing the judgment of the Court in *Dixon v. A*
Erle J. in *Thompson v. Hopper* (*d*); *Lord W*
 then *Parke* B., in *Gibson v. Small* (*e*); *Lord W*
 in *The Commercial Marine Company v. The*
Mining Company (*f*); in the Privy Council.]
 servations of *Erle* C. J., in *Foley v. Tabor*
 made in a case in which unseaworthiness
 of over loading and bad stowage was relied
 defence to the action. In *Simeon v. Bazett* (*h*)
 premium raised an implication that the loss
 the meaning of the parties. [*Blackburn* J.

board. In the case of a time policy there is no implied warranty of seaworthiness because the owner cannot know the condition of his ship at the commencement of the risk, and it may be impossible to put it into a sufficient state. [*Cockburn C. J.* Ex concessis, the latter cannot be done in the present case.]

The meaning of a contract must be gathered from the language used and the incidents which the law or custom and usage attach to it; and such incidents can only be varied or waived by express words or necessary implication; *Hutton v. Warren (a)*, per *Parke B.*, delivering the judgment of the Court, cited in note to *Wigglesworth v. Dallison*, 1 *Smith L. C.*, 5th ed., 527, 528. There is no qualification of the implied warranty on the face of this policy. The party who desires to engraft an exception on the warranty must insert it in the policy; *Knill v. Hooper (b)*. [*Wightman J.* May not a waiver of the warranty be implied? Suppose the description of the vessel in the policy shews that it is unfit to perform the voyage. *Blackburn J.* The following case of an insurance upon four prizes taken by a *French* cruiser is stated in *Emérigon, Traité des Assurances*, par *Boulay-Paty*, ch. vi. s. 4, p. 172 :—"L'un de ces navires, appelé le *Port Marchand*, avait eu dans le combat le grand mât et celui d'artimon rompus. Le capitaine amarinna les prises, et écrivit tout de suite pour qu'on les fit assurer. Partie des assurances furent faites à *Marseille*, sans qu'on y spécifiât l'état de ce navire. Il fut ensuite repris par les *Anglais*. Les trois autres furent repris également. Les assureurs refusaient de payer la perte; et ils insistaient en particulier sur ce que la police n'avait pas expliqué l'état délabré du navire démâté. Ils furent condamnés à payer l'entière somme assurée,

(a) 1 *M. & W.* 466. 475.

(b) 2 *H. & N.* 277. 283.

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attendu qu'ils devaient présumer que des vaisseaux pris après un combat, avaient été maltraités." *Wightman J.* Suppose the state of the vessel was expressed in the policy.] The warranty is the basis of the contract, and overrides the description of the vessel in the policy. [*Cockburn C. J.* The implied warranty is not necessarily the basis of the contract, if both parties agree that the ship is not seaworthy for the voyage.] Knowledge of the state of the subject-matter insured cannot affect the contract in the policy; *Barnett v. Wheeler (a)*. The underwriter and shipowner never can be on equal terms as to knowledge; and if such knowledge were material, it would not be necessary that the ship should be strengthened at all. [*Cockburn C. J.* The underwriter is entitled to expect that the ship would be made as seaworthy as it could be.] In the case of a covenant to keep premises in good repair, the "lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them;" *Payne v. Haine (b)*, per *Parke B.* It would be unreasonable that, if the ship was not so fit as an ordinary ship, a larger premium should be taken, and that, if the ship was lost by ordinary perils, the shipowner should be at the loss.

Cur. adv. vult.

Feb. 21. The following judgments were delivered.

COCKBURN C. J. This was an action on a policy of insurance effected on a steam vessel called *The Ganges*, on a voyage from *Liverpool* to *Kurrachee* or *Calcutta*. The vessel was built for navigating the river *Indus*, and was, on this account, of such a construction as to be unfit, generally, for ocean navigation. Everything,

(a) 7 M. & W. 364.

(b) 16 M. & W. 541. 545.

however, was done that possibly could be done, by temporary appliances, to render the vessel as strong as she could be made for the voyage on which she was insured.

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At the trial before me, at *Guildhall*, the case opened for the plaintiffs was that the construction and character of the vessel had been fully communicated to the defendants when the proposal for insurance was made; an assurance having been at the same time given that everything should be done to make her as strong and fit for the voyage as she could possibly be made; that an additional premium had been paid commensurate to the increased risk arising from the character of the vessel; and that as in point of fact, by various contrivances resorted to for the purpose, the ship had been rendered as strong as such a ship could possibly be made for the voyage to *India*, the implied warranty of seaworthiness was satisfied, and, the ship having been lost, the assured was entitled to recover.

The case for the defendants was directed to two points: first, to disproving the statement that the construction and character of the vessel had been made known to the insurers; secondly, to shewing that the vessel had not been made as strong as such a vessel was capable of being made for the voyage to *India*. On the latter point the case for the defendants entirely broke down; their witnesses, and in the end their counsel, admitting that the evidence for the plaintiffs had entirely satisfied them on this point. This being conceded, the case went to the jury on the first point alone; and, the jury having found for the plaintiffs on the question thus left to them, the verdict was entered for them.

It is contended for the defendants that the real issue in the cause was not disposed of; that as the policy of

1863. insurance contained no exception of the implied warranty of seaworthiness, the proper question for the jury was, not whether the original construction of the vessel had been made known to the insurers, or whether the vessel had been made as seaworthy for the voyage as such a vessel could be made, but whether the vessel was seaworthy, reference being had to the ordinary standard of seaworthiness applicable to the voyage in question.

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I cannot help here observing that I think it much to be regretted that the counsel for the defendants did not press upon me at the trial to leave this question also to the jury. I certainly should have done so had such a suggestion been made, and should have reserved the question of law had the finding of the jury been in favour of the defendants on this question while it was in favour of the plaintiffs on the others. For the point is one not only of novelty and difficulty, but also of considerable importance, owing to its having become, as appears from the evidence in this case, of not unfrequent occurrence to send vessels intended for river navigation in distant countries across the ocean (after fitting them for the voyage as well as can be done) and to insure them for such voyages. The counsel for the defendants appeared to me to accept the issues of fact and law propounded by the counsel for the plaintiffs, and the case was therefore disposed of on those issues. It is said that the learned counsel were misled by a casual remark of mine, on some question put to a witness on cross-examination, into supposing that I meant to rule that the issue was, as suggested by the plaintiffs' counsel, whether the vessel had been made as seaworthy as she was capable of being made. It is possible there may have been some misunderstanding, but I am disposed to think that the learned counsel at that time attached little import-

ance to the matter, as they evidently had confidence in their case, and believed they should succeed in defeating the plaintiffs on their own ground. I do not, however, make these observations with the view of at all questioning the right of the defendants to a new trial, if, through some misunderstanding or inadvertence, the proper question has not gone to the jury. I am only desirous it should be understood that I certainly should have submitted this question of fact to the jury, so as to prevent the possible necessity of the case going down again for trial, at a vast expence to the parties, had the counsel for the defendants in any way required it.

I, however, think that the issues which properly arise in this case have been disposed of, and that there is consequently no ground for granting a new trial. The authorities which bear upon the subject appear to me fully to establish that while, by the law of *England*, there is in every voyage-policy an implied warranty of seaworthiness, the term "seaworthiness" is a relative and flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which it is about to embark.

It seems to me to follow that, if an insurer agrees, with full knowledge of the facts, to insure a vessel incapable from her size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty must be taken to be limited to the capacity of the vessel, and will be satisfied if she is made as seaworthy as she is capable of being made. This view of the case becomes fortified if we consider the ground on which the doctrine of the implied warranty of seaworthiness rests. The insurer is entitled to expect that the shipowner will do all that it behoves a careful and con-

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scientious man to do to secure the safety of the crew who are to navigate the vessel, and of the merchant's goods which are to be conveyed in it; so that the risk covered by the insurance shall be limited to those perils incidental to navigation against which the care and skill of man cannot provide. But, if the parties are avowedly dealing with a vessel which no care or expence can bring up to the ordinary standard, and the owner does all that can be done to fit her for the voyage she has to encounter, of what has the insurer to complain? Why, the nature of the adventure being known to both parties, should the implied warranty be carried farther than that the shipowner shall do his utmost to make the particular vessel as fit for the voyage as she can be made?

There is, moreover, a rule applicable to warranties in contracts of sale which, if it is to be considered good law, appears to me perfectly applicable to such a warranty as we are now considering. It is laid down by the older authorities, and has been handed down by succeeding text writers to the present day, that, in a contract of sale, even in the case of an express warranty, defects patent and known to the buyer must be taken to be excluded from the warranty. The rule appears to me, *à fortiori*, applicable in the case of an implied warranty. The law, in an ordinary policy of insurance, superadds to the express terms of the contract an implied term, because in reason and justice it may be assumed that such a condition was intended to lie at the foundation of the contract. But if the subject-matter of the contract renders such an implied term either wholly or partially inapplicable, why, contrary to what must be taken to have been the intention of the parties, should a warranty of seaworthiness be implied to the full extent of an ordinary policy? It is plain that the underwriter

ould not, under the circumstances, honestly have subscribed the policy, reserving an intention of insisting on seaworthiness beyond the capacity of the vessel. Why then should such a stipulation or condition be imported into the contract? It may be objected, that to admit evidence of extrinsic circumstances to qualify the ordinary warranty of seaworthiness would be to admit parol evidence to control a written instrument. But it must be borne in mind that we are here dealing with a term not expressly contained in the contract, but implied in it upon the assumption of an intention on the parties not declared in the written instrument. It seems to me that, with reference to a term introduced into the contract from an assumed intention of the parties, evidence may be admitted of extrinsic facts to negative or qualify such intention.

It is fully admitted that evidence may be adduced to determine the degree of seaworthiness required with reference to the place and circumstances in which the vessel may be, as whether in a port or a river, or at sea, also with reference to the voyage or adventure, and the construction and equipment which, according to the existing state of nautical science and progress may be required. Why then may not extrinsic evidence be admitted as to the character of the vessel, in order to show the degree of seaworthiness which the parties had in view? It may be urged, no doubt, that any intended qualification of the warranty might be introduced into the policy. But the same objection might have been originally urged against implying the warranty at all; and might equally be urged against any of those modifications of the warranty which are now allowed to be made in order to adapt it to the various circumstances in which the vessel may be placed. And it must not

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be forgotten with how much tenacity the commercial community clings to established forms of mercantile instruments, of which the still subsisting though antiquated form of marine policy itself affords so striking an example. I cannot but think that where some rule of law does not stand in the way, we shall be best consulting the interest of the commercial world by giving effect to the intention of the parties to a contract where we can sufficiently collect it, rather than by insisting rigidly on a distinct enumeration of every particular.

For these reasons I am of opinion that this rule should be discharged.

WIGHTMAN J. Agreeing in the reasons of the judgment delivered by my Lord Chief Justice, I have thought it unnecessary to give a separate judgment.

MELLOR J. read the judgment of

BLACKBURN J. In this case I agree in the result with the other members of the Court; but as I do not agree in all the reasoning by which they arrive at that result, I shall deliver, as my judgment, one which I had prepared rendering my own reasons.

This was an action tried before my Lord Chief Justice at *Guildhall*, at the Sittings after *Trinity Term*, 1861. The declaration was on a policy of marine insurance on the steamer *Ganges*, insured from the *Clyde* or *Liverpool* to *Kurrachee* or *Calcutta*. There were pleas of unseaworthiness, and of undue concealment, on which issues were joined. The plaintiffs had the verdict, but the defendants obtained a rule nisi for a new trial on the ground of misdirection, against which cause was shewn in the last *Trinity Term*, before my Lord, my brother *Wightman* and myself.

In the argument I understood, from the statements the counsel for the defendants, that the point arose in a manner which I will presently state. It is not in accordance with the notes and recollection of my mind; but as I have come to the conclusion that, on the defendants' own statement of the case, the rule should be discharged, I will give my opinion on the assumption that the point arose as they stated it; and that I understood to be as follows. At the trial the defence was principally rested on the plea of undue concealment, but no other plea was not abandoned. It appeared on the evidence that *The Ganges* steamer was a vessel built in England for the purpose of navigating the *Indus*, and adapted only for river navigation, being of very slight draught of water, and in other respects not built for ocean navigation; and it further appeared that the assured had, before the policy was entered into, informed the defendants, through their agent, that she was of this character, and that it was the intention of the assured, before they sent her out, to add false keels to her, and strengthen her, and, as far as possible, to make her fit for the ocean voyage to *Kurrachee*. According to the case of the plaintiffs, at the same time the surveyors were, through their agent, informed of the condition of the vessel, and of every other particular material in estimating the risk. According to the defendants' case their agent was misinformed as to the draught of the vessel, which was a material circumstance; but, though this was the defence mainly relied on, the plea that the vessel was not seaworthy was not abandoned.

In the course of the trial it was admitted by the defendants' witnesses that everything which could be done to strengthen *The Ganges*, being such as she was,

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and to fit her for the voyage, had been done; but according to their evidence, after all that could be done had been done her state was such that, if an ordinary sea-going steamer had been no more fit to encounter the ordinary perils of a voyage to *India* than *The Ganges* was when thus strengthened, that steamer would not have been seaworthy.

My Lord, on this evidence being given, was understood by the defendants' counsel to express his opinion that the warranty of seaworthiness on such an adventure as this was not a warranty that the state of *The Ganges* should be such as would have been seaworthiness if she had been an ordinary ocean going steamer, and that she might be seaworthy though less fit than such a vessel should have been. After this opinion had been expressed the counsel for the defendants did not further raise the question of seaworthiness, and the only question discussed during the rest of the trial was that of the undue concealment, which was properly left to the jury. No mention was made of the plea of unseaworthiness by the defendants' counsel when addressing the jury, nor was my Lord asked to leave any question of fact to the jury on it. The verdict was found generally for the plaintiff. Under these circumstances the defendants' counsel must be taken to have admitted that, if the opinion supposed to have been expressed by my Lord was correct, the plea of unseaworthiness was disproved; but they cannot be taken to have abandoned the defence arising on the plea—they submitted to that opinion as a ruling of the Judge. From the course taken at *Nisi Prius* it was not necessary to give any direction to the jury on this point and no objection can now be made in banc on the ground that no particular point was left to the jury, for the

might have been corrected at *Nisi Prius* if the objection had been urged; but if the opinion thus expressed and submitted to was in substance incorrect in point of law, they are entitled to a new trial on the ground of misdirection.

I am, however, of opinion that the supposed ruling was correct.

Two questions of some difficulty arise,—the first: What is the meaning of the term “seaworthiness” as applicable to such an adventure as that which the parties certainly intended to insure?

The second: Whether, on the wording of the policy in this particular case, it is open to the parties to shew that the adventure was of this peculiar kind? It is convenient to consider these two questions separately.

It is perfectly settled that, by the law of *England*, there is in every voyage-policy of marine insurance an implied warranty or condition that, at the commencement of the risk, the vessel shall be seaworthy, by which, as is said in *Dixon v. Sadler* (a), “it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it.” This definition has always been considered correct, but the question we have now to determine is, what are the proper elements to be taken into consideration in determining whether the state of the vessel is *fit*; that as a question which did not arise in *Dixon v. Sadler*, and on which the judgment in that case gives us no assistance. It was contended before us that the meaning of the warranty of seaworthiness was that the vessel must always be brought up to a certain fixed standard

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(a) 5 M. & W. 405, 414.

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of fitness, and that, if she falls short of that, she is unseaworthy ; the counsel for the defendants did not furnish us with any certain guide as to what was the standard of fitness, but argued that there was one, and that it was independent of the nature of the adventure. If this was so, the ruling at the trial was wrong, and it would, in that case, be quite immaterial what the nature of the adventure was, and this river steamer ought to have been made as strong as a sea-going vessel bound for *India*. In support of the position that seaworthiness was a fixed thing, *Christie v. Secretan* (a) was cited. There *Lawrence J.* says that the warranty of seaworthiness "is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship, which is capable of performing her voyage, may be indemnified against certain contingencies ; and it supposes the possibility of the underwriter gaining the premium : . . . ; and if the consideration fail the obligation fails. In the case of *The Mills Frigate* (b) it was said that the ship's being capable of performing the voyage was the *substratum* of the contract of assurance." But nothing in that case depended on the question what were the elements to be taken into account in determining what amounts to unseaworthiness ; and the language of *Lawrence J.* was not chosen with a view to express any opinion on that point. And it seems clear that a mere capacity of performing the voyage, and earning the premium, is not sufficient to constitute seaworthiness. As a matter of fact a vessel, though far from seaworthy, may, and often does, successfully perform her voyage, and

(a) 8 T. R. 192. 198.

(b) 1 *Park on Insurance*, ch. xi. 7th ed. 334, &c., 8th ed. by *Hildyard*, 460, &c.

proves in one sense capable of performing it, whilst a seaworthy vessel may, and often does, perish without any extraordinary accident. We must therefore look for some other criterion to determine what constitutes seaworthiness.

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The question whether a vessel is seaworthy is, from its nature, one that in practice must almost always be determined by a jury on the evidence, with only a general direction from the presiding Judge, and, consequently, we find in the reported cases only general definitions of seaworthiness, not rendered precise by being made referable to particular facts. In *Small v. Gibson* (a), however, it became material to consider what was the nature and extent of the warranty of seaworthiness. The question in that cause was, whether the warranty of seaworthiness, certainly implied by law in voyage policies, was also implied by law in time policies. It was therefore important to consider what was the principle on which the warranty of seaworthiness was implied in voyage policies, and, though that did not directly raise the question what constituted seaworthiness, yet the questions are very analogous. *Maule J.*, who was a lawyer peculiarly conversant with marine insurance, says, 4 *H. L. C.*, p. 388 :—"It appears to me that the foundation of the admitted rule, that in a policy on a voyage there is an implied condition or warranty that the ship was seaworthy at the beginning of the voyage, is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy ; and that it is usual, and a matter of course, to make a ship seaworthy before the commencement

(a) 16 *Q. B.* 128 ; in *Exch. Ch.*, *Id.* 141 ; in *D. P.*, 4 *H. L. C.* 353.

1863. of a voyage." And *Parke B.*, p. 404, enunciates nearly
 BURGESS the same principle. He says: "The usual course being
 V. that the assured can and may secure the seaworthiness
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 indirectly, if he is the shipper, it is by no means unreasonable to imply such a contract It may happen, indeed, in some cases, from the want of proper materials, of skilful artizans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard these exceptional cases, '*ad ea quæ frequentius accidunt jura adaptantur*;' and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage-policies, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage." *Erle J.* in the same case gives a definition of seaworthiness. He says, *Id.*, p. 384:—"A ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. I have not found a definition of the word, but I gather its meaning, as above explained, from the decisions turning upon it." He came to a conclusion on the question in *Gibson v. Small* (a) different from that arrived at by *Parke B.* and *Maule J.*, but his definition of seaworthiness is quite consistent with what is said by them.

The state into which a prudent owner uninsured would require the vessel to be put is that state in which

(a) 16 Q. B. 128; in Exch. Ch., *Id.* 141; in D. P., 4 H. L. C. 353.

it would be usual and of course in the transaction which is the subject-matter of insurance to put her, and is that state in which she ought to be put. The same idea is conveyed by Lord *Mansfield* in *Carter v. Boehm* (a), where he says, speaking of it as on analogy, "The utmost which can be contended is, that the underwriter trusted to the fort being in the condition which it ought to be: in like manner, as it is taken for granted, that a ship insured is seaworthy." In *Tidmarsh v. The Washington Fire and Marine Insurance Company* (b), Mr. Justice *Story* remarked that in many ports "the standard of sea-worthiness has been gradually raised within the last thirty years." This observation seems to have met with the approval of the textwriters both in *America* and this country; see 1 *Phillips on Insurance*, 3d ed., p. 391, s. 719, and 1 *Arnould on Insurance*, 2d ed., p. 713, s. 256. It is obvious that the notion that the standard of seaworthiness can be raised is not consistent with the idea that some fixed degree of capacity to encounter the perils of the voyage is necessary to constitute seaworthiness. But, if the warranty of seaworthiness means that the vessel is to be put in that state into which she ought to be put when engaged in such a transaction,—that degree of fitness to encounter the perils which it would be usual and prudent and of course to require at the commencement of the voyage, then the standard of seaworthiness must rise with the improved knowledge of shipbuilding and navigation. A merchant in old times about to send out a vessel, if he did his utmost to fit her for what was then a perilous voyage, fulfilled his duty to his co-adventurers who risked their goods, and the crew who risked their lives, on board the vessel; if he

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(a) 3 *Burr.* 1905. 1915.

(b) 4 *Mason (American Reports)*, 439. 441.

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did so to the extent which was then usual and of course in the transaction, he could not be expected to do more than was then practicable; but a modern shipowner, who was to send a ship on the same voyage no better fitted than the ancient vessel, would not fulfil his duty to either one or the other, for the very reason suggested by *Story J.*, that the standard of seaworthiness had been raised; and it must rise if the definition is that given by *Erle J.* in *Gibson v. Small (a)*, for the state of fitness in which a prudent owner uninsured would, as of course, put his vessel, must rise with the increased power to put her in a fit state. Now, if this be the meaning of seaworthiness, as I think it is, it follows at once that it must be relative to the kind of adventure.

It was forcibly observed by the plaintiffs' counsel in the course of the argument in this case, that if the warranty of seaworthiness were construed to mean a warranty always to put the vessel in the same degree of fitness whatever were the nature of the adventure, it would in cases such as the present be impracticable to comply with it. The warranty, they said (and I think truly said), must be construed in such a way as not to be repugnant to the general adventure in which the parties were engaged. Mr. *Macnamara*, who argued for the defendants with great ability, urged that if this view of the law were adopted there would be uncertainty; and he truly said that seaworthiness could not vary with the pecuniary resources of the assured, and other circumstances which he suggested. The remarks of *Parke B.* in *Gibson v. Small (a)*, above cited, both confirm this, and I think shew that it is not applicable to the present case. Exceptional circumstances, such as he refers to, afford reasons for inserting in policies a stipulation

(a) 16 Q. B. 128; in Exch. Ch., *Id.* 141; in D. P., 4 H. L. C. 353.

that there shall be no warranty of seaworthiness or a qualified one, but do not prove that the ship is seaworthy, for they do not prove that she is just in the state in which, in such a transaction, a prudent owner uninsured would generally put a ship of this kind. Extreme cases were suggested in the argument as of some rash person going to *America* in a *Thames* wherry, but the rules of law, and more especially of mercantile law, are framed with reference to the ordinary affairs of men. Maritime adventures are ordinarily entered into with a view to carry them out successfully in order to earn profit, and they are attended with more or less risk even when every thing is put in the state in which it ought to be for such an adventure. If such an adventure is insured, the underwriters, when fixing the rate of premium, consider what will be the risk if the ship be put in the state in which she ought to be put on beginning such an adventure; but what that state is must depend on the whole nature of the adventure. The assured warrants that she shall be put in that state, but he warrants no more. It is clear that an owner uninsured, who had determined to send a vessel such as *The Ganges* to *India*, could not in the ordinary course of things do more than on the defendants' own evidence it appeared the plaintiffs had done in this case. It is true that when it was all done it appears the adventure was more dangerous than an ordinary voyage to *India*, but the assured do not in any case warrant the prudence of the adventure, — that is for the underwriters to consider when fixing the premium; and to enable them to do so the assured are bound to disclose every material circumstance. It was said, in *Knill v. Hooper* (a), "that the term 'seaworthiness' is a relative term: there is no positive con-

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(a) 2 H. & N. 277. 283.

1863. dition of the vessel recognised by the law to satisfy the
BURGES warranty of seaworthiness." I think it is relative to
v.
WICKHAM. the nature of the adventure in every respect.

Taking all these considerations into account, I think that, on such an adventure as this, viz., sending a river steamer across the ocean, the warranty of seaworthiness was complied with if as much was done to make her fit for the voyage as was in such adventures usual and proper; though it might not make her as fit for the voyage as would have been usual and proper if the adventure had been that of sending out an ordinary seagoing vessel. Perhaps, if the case had been left to the jury, it might have been proper to call their attention to the question whether *The Ganges* was made as fit for the voyage as was usual and customary in such adventures, (which are by no means unusual), as at least an important element in determining whether she was reasonably fit for it; but, as already said, the course which was taken at Nisi Prius prevents the defendants from now raising any objection on this score. It is enough if the opinion expressed, and to which they deferred as a ruling, was substantially right.

The second question is one of a more technical nature but also of importance and difficulty. A policy of insurance is the written record of the contract between the parties, and according to the general law of *England*, being the written record of the contract, it must not be varied or added to by verbal evidence of what was the intention of the parties. Incidents may be annexed by the general law of the land, or by a general custom, but such incidents though not actually written in the contract are considered to be tacitly included in it; the warranty of seaworthiness implied by the general law of *England*

in every voyage policy is as much a part of that policy as if there were written in it "warranted seaworthy." I think that parol evidence can no more be admitted to contradict or qualify an implied warranty than it could have been if the warranty had been expressed. *Gatliffe v. Bourne*, in error (a) has sometimes been supposed to be an authority to the contrary, but it is misunderstood. There it was necessary to prove the course and usage of delivery in the port of *London*, and therefore it was necessary that evidence to disprove the custom should also be admitted. It was upon this ground, and on this only, that evidence of what the parties did was admitted,—it was not let in for the purpose of altering or explaining the contract. The final direction to the jury was, that if, upon consideration of the evidence, they were of opinion that the delivery was not according to the usage and practice in the port of *London*, they were to find for the plaintiff. It was not left to them to say whether the parties intended to contract for a delivery according to that usage or not. And it seems plain on principle that every mischief arising from admitting parol evidence, to vary a written contract, arises equally whether it is admitted to vary an express or an implied part of that contract.

Now in the present case the policy expresses that the plaintiffs are assured "at and from all or any ports and places in the *Clyde*, or from *Liverpool* to *Kurrachee* or *Calcutta*, and for the space of thirty days after her arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called *The Ganges*, a steamer." If the plaintiffs' case were that *The Ganges* steamer was not seaworthy, but that it was intended that the warranty implied by law should not apply to

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(a) 3 M. & G. 643.

1863. her, or that there should be some exception from or
 qualification of that warranty, I think the plaintiffs
 would fail, as there is nothing on the face of the policy
 to express any such intention, and, as I have already
 said, I think no such intention can be proved by ex-
 trinsic evidence. But this is not the case of the plain-
 tiffs. It is always permitted to give extrinsic evidence
 to apply a written contract, and shew what was the
 subject-matter to which it refers. When the stipulations
 in the contract are expressed in terms which are to be
 understood, as logicians say, not simpliciter, sed secun-
 dum quid, the extent and the obligation cast upon the
 party may vary greatly according to what the parol
 evidence shews the subject-matter to be; but this does
 not contradict or vary the contract. For example, in a
 demise of a house with a covenant to keep it in tenant-
 able repair, it is legitimate to inquire whether the house
 be an old one in *St. Giles'* or a new palace in *Grosvenor
 Square* for the purpose of ascertaining whether the
 tenant has complied with his covenant, for that which
 would be repair in a house of the one class is not so
 when applied to a house of the other (see *Payne v.
 Haine* (a)). So, suppose a sale of a horse warranted to
 go well in harness; the qualities necessary to constitute
 a good goer in harness would be different in a pony fit
 to draw a lady's carriage or a dray horse; or in a lease
 of *Whiteacre* for a year with an express contract to culti-
 vate it in a proper manner, the quantity of manure and
 labour which the tenant would have to bestow must be
 different according as *Whiteacre* consists of hop gardens
 or meadows. In each of these cases you legitimately
 inquire what is the subject-matter of the contract, and
 then the terms of the stipulation are to be understood,

(a) 16 M. & W. 541.

not simpliciter, but secundum quid. The two last instances I have supposed are not, as far as I know, decided cases ; but I give them to explain my meaning as examples of a general rule. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure ; it is to be understood, not simpliciter, but secundum quid. The doubt on this part of the case which I have felt, and which is not even now altogether removed, is whether the parol evidence to shew that *The Ganges* steamer was bound on such an adventure as she really was, does not contradict the terms of the policy, which describes her as a steamer bound from the *Clyde* or *Liverpool* to *Kurrachee* or *Calcutta*. That description would certainly be primâ facie understood to describe a vessel bound on an ordinary voyage between these ports. But the description is not so worded as to be inconsistent with her being a vessel bound on this less usual adventure between these ports. I feel that it is going far, but I think we should put a liberal construction on the terms of policies of insurance ; for they are drawn by brokers, who habitually express themselves very briefly, trusting to the obligation on the assured to disclose every particular tending to affect the risk, so that the policy is void unless the underwriter knows what he is really insuring. We do not therefore run much risk of doing injustice if we give considerable latitude in applying the language used, whilst a more strict construction may, in many cases, and this would be an instance, defeat the intention of the parties. It is very desirable that brokers should take the trouble to insert a few words in their policies to indicate that the adventure is out of the common line, wherever such is the case. By so doing, they will

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avoid the risk of litigation. In the present case, with some doubt, I think it was not indispensable to insert more than was inserted in the policy. The parties may perhaps find that other Judges think it was.

I am of opinion that the ruling at the trial was right, and that the rule obtained for a new trial should be discharged.

The point was not reserved at the trial, but on a question such as this the defendants should have leave to appeal if so advised.

Rule discharged (a).

(a) The cause was settled.

Tuesday,
February 10th.

*Marine in-
surance.
Notice of
abandonment.
Depositary of
policy.*

JARDINE and others *against* LEATHLEY.

1. The deposit of a policy of insurance on a ship at sea, which is afterwards injured by perils insured against and condemned, does not invest the depositary with implied authority to give notice to the underwriter of abandonment as for a total loss.
2. *Quære*, if there were a mortgage of the ship?

THE first count of the declaration was on a policy of insurance in the usual form, for 6000*l.*, dated 28th July, 1858, on the ship *Glenmanna*, and her freight, on a voyage from *Bombay* to the *United Kingdom*, underwritten by the defendant for 200*l.* ; averring a total loss by perils insured against.

The second count was to recover 4*l.* 15*s.*, expenses incurred under the labour and travel clause.

The defendant pleaded, to the first count, payment into Court of 50*l.*, &c., and to the second the general issue.

The plaintiffs replied to the first plea, damages *ultra*, and took issue on the second.

On the trial, before *Mellor J.*, at the *Liverpool Spring Assizes*, 1862, it appeared that the plaintiffs were merchants at *Liverpool*, and the defendant an underwriter at *Lloyd's*. The insurance on the ship and freight was effected, on the 28th *July*, 1858, by Messrs. *Foster, Lacy & Co.*, as agents for the plaintiffs; and the ship sailed on the 23d *December* in that year, but never reached her destination, having leaked so as to be compelled to put into port at *St. Thomas* in the *West Indies*, where she was condemned and sold by her captain. During her voyage, the plaintiffs deposited the policy with the *Borough Bank of Liverpool*, as security for a temporary loan. While the policy was in their possession, intelligence having arrived of the fate of the ship, notice of abandonment was given by the following letter:—

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Liverpool, June 3d, 1859.

"Gentlemen. We are authorized by the liquidators of the *Liverpool Borough Bank* to inform you that the policy for 6000*l.* on the ship *Glenmanna*, dated the 2d *July*, 1858, effected by you on behalf of Messrs. *John Jardine & Son*, of this town, has been assigned by them to the *Liverpool Borough Bank*, who are now entitled to the full benefit of the policy, and to request that you will be good enough to give notice to that effect to the underwriters. We are also desired to request that, as advices have been received of the ship having become a total loss, you will be so good as to give the usual notice of abandonment on behalf of the assured. We shall be glad to hear from you that this has been done."

"We are, Gentlemen,

"Messrs. *Foster, Lacy & Co.* "Your obedient servants,
"14, *Cornhill, London.*" (Signed) "*Lace. Marshall & Co.*"

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There was no proof that the plaintiffs, one of whom was examined as a witness at the trial, knew of the abandonment; and at the conclusion of his evidence the defendant's counsel objected that no sufficient notice of abandonment had been given, and consequently that the loss must be treated as a partial one only. The learned Judge, however, reserving leave to move to enter a verdict for the defendant on this point, left to the jury whether, in point of fact, notice of abandonment had been given by the liquidators of the bank to the defendant. Other points were made to which it is unnecessary to refer. The jury having found for the plaintiffs as for a total loss,

Edward James, in *Easter Term*, 1862, on the 24th of *April*, obtained a rule nisi to enter a verdict for the defendant, or for a new trial; on the ground that the notice of abandonment was not given by a person having authority to give it.

Brett and *Milward* shewed cause.—Where the policy of insurance on a ship is, before her loss, pledged by the assured as a security for advances, the pledgee has the implied authority of the pledger to give notice of abandonment; which authority being coupled with an interest, is irrevocable by the assured. If this were not so, the pledgee would have no legal security for the money advanced, and would be dependant for its repayment on the honour of the pledgor. [*Crompton J.* That doctrine would be hard on the pledgor, because it would deprive him of the opportunity of choosing whether he would abandon the ship as a total loss or not.] Notice of abandonment as for a total loss can only be given when no reasonable person could hesitate to abando

the ship. Besides, in this case, the objection is not taken by the pledgor or pledgee, but by the underwriter, on whom there is no hardship, seeing that the assured can withdraw the notice at any time before it is accepted. The other side must contend that the notice of abandonment here would be vitiated for want of the concurrence of every person having any share, however small, in the ship. [Crompton J. You must go the length of saying that the plaintiff, after he deposited the policy, had no longer a right to give notice of abandonment: otherwise, the pledgee might give notice of abandonment, while the assured might disclaim it. *Knight v. Faith* (a) shews that notice of abandonment must be given to entitle the assured to recover as for a constructive total loss; and *Stewart v. The Greenock Marine Insurance Company* (b) establishes that when a ship which has been insured is not altogether annihilated, the assured, claiming for a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, and this includes the freight which the ship was in the course of earning.]

When this rule was moved *Blackburn J.* referred to *Pothonier v. Dawson* (c), where *Gibbs C. J.* held that a deposit of goods by way of security to indemnify a party against a loan of money is more than a pledge, and the depositary has a right to sell the goods; a case which is recognised in *Story, Bailm.*, § 310, 5th ed. [Wightman J. I do not see how that applies. They do not propose to sell on this policy.] The possessor of an ordinary lien has no power to sell, but it is otherwise with a mercantile one. In 2 *Arnould Ins.*, 2d ed., p. 1161, § 407:

(a) 15 Q. B. 649.

(b) 2 H. L. C. 159.

(c) *Holt, N. P. C.* 383.

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"An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of the insurance, but it must be such as to effect that transfer absolutely and unconditionally. 'Every abandonment,' says *Valin*, 'must be pure and simple, and not conditional, otherwise it would not act as a *transfer of ownership, which is of the very essence of abandonment*.' Hence it follows, that no one can be entitled to make an abandonment who has not at the time of the loss an absolute right of ownership in the subject insured." Thus, it has been decided in the *United States*, that, where the assured has abandoned all his interest in the subject of insurance to one set of underwriters, he cannot afterwards make an abandonment to other underwriters of the same subject:" referring to *Higginson v. Dall* (a). "So, again, it has been there held, that, if the assured, by mortgaging his ship, has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon to the underwriters on ship, but can recover only for the damage he has actually sustained, as a partial loss;" and for that is cited *Gordon v. The Massachusetts Fire and Marine Insurance Company* (b). "Whether the consignee of a bill of lading has a right to make abandonment of the goods must depend on the question, whether the possession of the bill of lading gives him a right to have the absolute and unconditional possession of the goods. In several cases, indeed, tried before Lord *Ellenborough*, which arose on the *American embargo* of 1807, and in which it appears that the consignees in *England* of the bills of lading had abandoned goods detained by that embargo, Lord *Ellenborough* thought it might be difficult to make out that they had

(a) 13 *Massachusetts Rep.* 96.(b) 2 *Pick. Mass. R.* 249.

such an interest as would entitle them to abandon, because they were to have no control over the goods till their arrival; his Lordship, however, gave no decision on the express point, and the cases were decided against the right of the consignees on other grounds;" citing *Conway v. Gray* (a) and the two other cases there. The marginal note of *Gordon v. The Massachusetts Fire and Marine Insurance Company* is not, however, borne out by the report, for in that case there was no possibility of anything being left in the person who took it upon him to abandon.

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[They also referred to *Cammell v. Sewell* (b), and stated, as an additional reason for a new trial, that an actual mortgage of the *ship* had been executed.]

Mellish and T. Jones (Northern Circuit), contra.—Here was no pledging of the *ship*,—it was a mere pledging of the *policy*, that cannot, without *express* authority from the pledgor, authorize the pledgee to change a partial into a total loss. [*Crompton J.* The loan might be for a mere sum of 5*l.*, 10*l.* or 20*l.* until the next day.] The effect of the doctrine of the other side would be to enable the pledgee, by this notice, to vest in the underwriter both the ship and freight; *Stewart v. The Greenock Marine Insurance Company* (c); which might be for a debt far below the value of the policy. Even a ratification of such a notice by the assured would not render it valid; *Bird v. Brown* (d). [*Brett.*—There the notice was given by a perfect stranger.]

(a) 10 *East*, 536.(b) 3 *H. & N.* 617; *aff.* on error, 5 *Id.* 728.(c) 2 *H. L. C.* 159.(d) 4 *Exch.* 786.

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In 2 *Arnould, Ins.* 1172, § 411, 2d ed., we find:—
“The law of *England* agrees with that of *France* and the *United States* in holding that, if a notice of abandonment is once accepted by the underwriters, it is irrevocable, unless made under a mistake of fact. The underwriters, by their acceptance of the offer to abandon, deprive themselves of all power to object to the grounds on which the abandonment is made, and cannot afterwards refuse to pay the whole sum insured, even though the thing insured should be restored, uninjured, before action brought.” He then cites *Smith v. Robertson* (a).

WIGHTMAN J. This was a mere deposit of a policy of insurance as a security for an advance of money, and it is contended, on the part of the plaintiffs, that this conferred, by implication, authority on the pledgee to do all necessary to make that security available. Now, it may be that here was an implied authority in the pledgees to bring, if necessary, an action on the policy in the name of the assured : but we need not decide that point, for the contention of the plaintiffs goes far beyond it—they say, not merely had the pledgees implied authority to make the policy available simpliciter, but also to give notice of abandonment of the ship, and so convey irrevocably the property in her, which might be to an amount far beyond what the policy could reach or touch. *Express* authority to do this might, of course, be given, but no authority has been cited in support of the proposition that merely pledging the policy gives any such authority. In the present case, however, it happens that the pledgees had authority, for it now turns out they have a mortgage on

(a) 2 *Dow, P. C.* 474.

the ship which was not put in evidence at the trial, so that they are not only depositaries of the policy, but something more. We therefore think that, under all the circumstances, there ought to be a new trial on payment of costs by the plaintiffs, in order that they may avail themselves of that mortgage.

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CROMPTON J. I had considerable doubt whether the pledgees here may not have supposed that in consequence of the deposit of the policy they were entitled to sue on it in the name of the assured; and power so to sue is often given in deeds. But it is unnecessary to decide that point; for it is very important to observe, as pointed out by my brother *Wightman*, that this deposit does not affect the property in the *ship*, but in the document deposited. It is clearly established that, in order to be able to give notice of abandonment, the party must have the property in the ship. This rests on good reason; and *Knight v. Faith (a)*, in this Court, and *Stewart v. The Greenock Marine Insurance Company (b)*, are authorities that, in cases like the present, notice of abandonment is necessary. The effect of abandonment is to vest in the underwriter, not only the property in the ship, but in the freight, so that the giving notice of it is a matter of great importance to the owner. Still, that does not decide the question before us, for taking the case on the facts proved at the trial, and without any new evidence, it is contended by the plaintiffs they had a right to give this notice, and that the pledgees are their agents to give it for them. I am not satisfied that they have any

(a) 15 Q. B. 649.

(b) 2 H. L. C. 159.

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such implied authority. The insured ask for a temporary loan for a few days (perhaps for a very small sum); the plaintiffs say that from that we should imply an authority to sell and assign the ship. The transaction may well mean that the plaintiffs still keep the ship; and I agree with the defendant's counsel that, as laid down in *Bird v. Brown*(a), a ratification of the pledgees' act by the plaintiffs would not render it valid.

There is another point here, namely, whether there ought not to be a new trial on payment of costs by the plaintiffs. One of them was called as a witness, but was not asked if the plaintiffs knew that this ship was going to be taken by the underwriters. Now, however, it is said there is a deed equivalent to a mortgage of the ship. I will not say what the effect of that deed may be; but it is right to give the plaintiffs the opportunity of raising any point they can upon it.

MELLOR J. The objection to the notice of abandonment was taken immediately after the evidence of the plaintiff who was examined. If any thing depended on his knowledge of the fact that it was given, that witness could have been recalled, for he was in Court. If, on the disaster occurring to the ship, the plaintiffs had no authority to give notice of abandonment, there would be much force in the argument of their counsel. But on that event occurring they could themselves take all necessary measures, and therefore it was not requisite that they should confer on the pledgees of the policy authority to do so for them. From the very nature of notice of abandonment, it follows that it must come from a per-

(a) 4 Exch. 478.

son having the absolute property in the ship, which he can by such notice vest in the underwriter.

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The following rule was ultimately drawn up:—

“ It is ordered, that the verdict found for the plaintiffs for a total loss be set aside, and in lieu thereof a verdict be entered for the plaintiffs on the first issue for such damages by way of average loss only as shall be ascertained and certified by an arbitrator (to be agreed upon between the parties, and in the event of their disagreeing by a learned Judge) to have been sustained by the plaintiffs beyond the sum paid into Court; and if such arbitrator shall find such loss to be less than the sum paid into Court, the verdict is to be entered for the defendant; and that the verdict on the second issue be now entered for the defendant, unless the plaintiffs shall, within fourteen days after service of this rule, elect to take a new trial, and pay, or undertake to pay, to the defendant, the costs of the former trial and of this rule, to be taxed by one of the Masters, in which case a new trial shall be had between the parties.”

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Saturday,
February 21st.

The QUEEN against The METROPOLITAN BOARD of WORKS.

*Right to water.
Underground
springs.
Pond.
Commissioners
of sewers.
Compensation.
Metropolitan
Sewers Act,
1848, 11 & 12
Vict. c. 112.
ss. 50. 69.*

A. was the owner of an estate, part of which was situate upon a bed of gravel, which itself was imbedded in a basin of clay extending under it and the lands adjoining. In the lower part of it was a pond of the depth of four feet, formed in the gravel bed, which had existed there from time immemorial, and in which the water rose naturally in considerable quantity from several powerful springs at the bottom of it, and thence overflowed the western edge of the clay basin, and formed a rivulet which ran through the grounds and supplied ornamental ponds therein; and was used for the cattle and for supplying the garden of the house. The Metropolitan Commissioners of Sewers, in constructing a sewer along and under the centre of a highway, cut through the bed of gravel and the basin of clay which enclosed it, at a distance from *A.*'s estate varying from 17 to 153 yards. The immediate effect was to draw the springs rising in the bed of gravel, and prevent them from finding their way into the pond, so that it became dry, and the rivulet and other ponds ceased to be supplied with water. The Metropolitan Sewers Act, 1848, 11 & 12 Vict. c. 112. s. 50, contains a proviso that where any work done by the Commissioners in pursuance of the provisions of the Act "shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby in manner herein provided concerning compensation to persons sustaining damage by reason of the exercise of any of the powers of the Act." Sect. 69 enacts that full compensation shall be made out of the rates to be levied under the Act "to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." Held,

1. That independently of the statute *A.* was not entitled to compensation, as the effect of the sewer was only to intercept underground springs which would otherwise rise into the pond.

2. That *A.* was not entitled to compensation under sect. 69 of the statute; per *Cockburn C. J.*, *Wightman* and *Mellor JJ.*: nor under the proviso in sect. 50; per *Wightman* and *Mellor JJ.*; *Cockburn C. J.* dissentiente, on the ground that *A.* had a right to the water after it had risen to the pond, and that right had been interfered with and prejudicially affected.

MANDAMUS to the Metropolitan Board of Works.
The writ recited that, under and by virtue of The Metropolitan Sewers Act, 1848, 11 & 12 Vict. c. 112., and The Metropolitan Sewers Amendment Act, 1849, 12 & 13 Vict. c. 93., (which Acts were amended and continued by stats. 14 & 15 Vict. c. 75., 15 & 16 Vict. c. 64. and 16 & 17 Vict. c. 125.)

17 *Vict. c. 125.*; and by The Metropolis Local Management Act, 18 & 19 *Vict. c. 120.*, The Metropolitan Sewers Act, 1848, and the Acts amending the same, were further continued,) a commission of sewers was, on the 22d *November*, 1854, issued for the city and liberties of *Westminster* and the borough of *Southwark*, and certain other places and districts which comprised the parish of *Lewisham*, in the county of *Kent*; and that by that commission the persons therein named were duly constituted and appointed "The Metropolitan Commissioners of Sewers," and empowered to act as such Commissioners as well for the parish of *Lewisham* as for the other places and districts in that commission mentioned, and to carry into effect the provisions of those statutes as the same were applicable and in force with reference to the parish of *Lewisham* and those other places and districts. The writ recited portions of sects. 38, 50, and 69 of stat. 11 & 12 *Vict. c. 112.*; and then suggested the facts set forth in the special case hereinafter stated, among others the existence of a pond or pool containing large quantities of water rising from natural springs in its bed or basin to the use of which the prosecutors were entitled as of right, and the making of a drain or sewer by the Commissioners, by reason of which large quantities of that water had been permanently withdrawn from the pond or pool, so that the same became dry.

The writ then recited that, by stat. 18 & 19 *Vict. c. 120.*, it was enacted that, after the commencement of the Act, all duties, powers and authorities vested in the Metropolitan Commissioners of Sewers should cease to be so vested, and that all property, matters and things whatsoever vested in the Metropolitan Commissioners of Sewers (except certain sewers in the Act particularly excepted) should be vested in the defendants,

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and that all moneys then due or owing by or recoverable from the Commissioners should be paid by or recoverable from the defendants. And that the Act commenced and came into operation after the making of the drain or sewer, that is to say, on the 1st *January* 1856 (sect. 251); and thereupon the drain or sewer, the same having been theretofore vested in the Metropolitan Commissioners of Sewers and not being one of the sewers in the Act in that behalf excepted, thereby the same became and was vested in the defendants, and the same had ever since been maintained and continued by the defendants; and all moneys then due and owing by or recoverable from the Metropolitan Commissioners of Sewers then became payable by or recoverable from the defendants.

The writ further suggested that no compensation had been made either by the Metropolitan Commissioners of Sewers or by the defendants to the prosecutors, for the damage and injury they had sustained by reason of the making of the drain or sewer, or for any loss of water thereby occasioned; nor had any purchase of the right to the use of the water of the pond been made either by the Metropolitan Commissioners of Sewers or by the defendants: that the prosecutors were entitled to receive compensation, and since the commencement of The Metropolis Local Management Act required the defendants to make compensation, and, the same being of an amount exceeding 50*l.*, offered to have such compensation assessed by arbitration in manner authorized by The Lands Clauses Consolidation Act, 1845; and that they had, for that purpose, appointed an arbitrator, and required the defendants either to concur in his appointment on their behalf as well as on behalf of the prosecutors, or to appoint another person to act as arbitrator.

on their behalf with him ; but the defendants neglected and refused to make compensation, or to have such compensation assessed by arbitration.

The writ commanded the defendants to make compensation to the prosecutors for the damage, injury and loss sustained by them by reason of the construction of the drain or sewer, and for that purpose either to concur with them in the appointment of an arbitrator to act on their behalf as well as on behalf of the prosecutors, or to appoint another person to act on their behalf with the arbitrator appointed by them, and to assess compensation in the manner authorized and directed by The Lands Clauses Consolidation Act, 1845.

Return. That the Metropolitan Commissioners of Sewers, under and by virtue of the commission in the writ mentioned and of the statutes enabling them in that behalf, in order effectually to drain a very large and populous portion of the area within the limits of the commission, in *July*, 1854, commenced the construction of a main sewer in the county of *Kent*, and the same was completed in *July*, 1855: [the return stated its direction and length:] that the main sewer was necessary for effectually draining the area through which it passed ; and was properly designed to attain the object proposed, and was constructed throughout with care and skill, and of sound and suitable materials : that this main sewer is the drain and sewer mentioned in the writ : that the part of the main sewer mentioned in the writ runs along the entire of the public high road leading through *Lewis-ham* : that the main sewer passes opposite the property of the prosecutors, at a distance not nearer than 250 feet from the pond or pool in the writ mentioned, and at a distance of 50 feet from the nearest part of the premises

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mentioned in the writ: that the main sewer, for a distance of 2000 feet, and in part opposite to the premises of the prosecutors, is at a depth of 16 feet below the surface of the public highway: that no part of the soil of the public highway through which the sewer passes was or is the property of the prosecutors: that the main sewer in no part thereof touches the premises of the prosecutors, or in any way injures or prejudicially affects their premises: that the Commissioners of Sewers, in constructing the sewer, did not cut into, divert, or interfere with any stream, pond, or pool of water whatever of the prosecutors, nor did they in any way interfere with, injure, or prejudicially affect any right of the prosecutors to the use of any water, nor did they divert, subtract, or withdraw from the pond or pool any water which had ever formed an integral part thereof or of any stream of water or of any water whatever belonging to the prosecutors: that the prosecutors had not sustained any damage whatever from the construction of the main sewer entitling them to compensation from the Commissioners of Sewers or the defendants, &c.

Plea. That the main sewer in the return mentioned (being the drain or sewer in the writ mentioned) had materially injured and prejudicially affected the premises of the prosecutors, and that the Commissioners of Sewers, by constructing the said sewer, did divert and interfere with the pond or pool and the streams and water in the writ mentioned, and did greatly interfere with, injure and prejudicially affect the right of the prosecutors to the use of divers large quantities of water to which they were entitled, and that the Commissioners did divert, subtract and withdraw from the pond or pool divers large quantities of water which

had formed an integral part thereof and of the water belonging to the prosecutors, and the prosecutors had sustained damage from the construction of the sewer entitling them to compensation, &c.

Issue thereon.

Also demurrer, and joinder therein.

The demurrer came on for argument in *Trinity Term*, 1859, when it was ordered that the facts should be stated in a special case for the opinion of the Court.

The following case was accordingly stated:—

The prosecutors, *Henry Tibbetts Stainton*, *James Maclean* and *Henry Dawson*, are the owners of an estate in fee simple, as joint tenants, in a messuage and premises, with the appurtenances, situate in the parish of *Lewisham*, in the county of *Kent*, being devisees under the will of *Henry Stainton*, deceased, who had been seised thereof from the year 1817. The messuage and premises are situate in the valley of the river *Ravensbourne*, and are surrounded on the eastern side by high grounds, and on the southern part of these premises is a field called *Springfield*, containing about three acres. *Springfield* slopes from south-east to north-west, and is situate upon a deep bed of gravel or porous earth which itself is imbedded in a basin of blue clay commonly called the *London* clay. Into this bed of gravel the waters descending from the adjoining high grounds and surrounding lands are carried, and therein retained. *Springfield* was purchased and annexed to his estate by *Henry Stainton* in the year 1835. In the lower part of this field was a pond of the depth of four feet formed in the gravel bed, and which had existed there from time immemorial, and in which the water rose naturally in a considerable quantity from several powerful springs at

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the bottom of it, and thence overflowed the western edge of the clay basin, and formed the rivulet after described, which edge of clay, or clay band, extended along the western side of the field and for a considerable distance beyond in a north-easterly direction. This pond was the principal inducement to the purchase of the field by *Henry Stainton*, the consideration for which purchase was no less than 1000*l*. The water of this pond was pure and clear, and fit for domestic use, and, the supply being constant and abundant, the pond was soon afterwards, that is, in the year 1836, widened and enlarged by *Henry Stainton*, and formed into an ornamental lake, with brickwork at the sides, and from it was carried a rivulet or stream, being the overflow of the pond before mentioned, extending for about three quarters of a mile in a winding course, through pasture fields and other grounds, to a flower garden adjoining the messuage, and into certain other ornamental ponds or reservoirs, supplying in its course water for the messuage and for the gardens adjoining thereto, as well as for the cattle in the fields, parcel of the premises. The bed or channel of the rivulet or stream was constructed with clay and masonry on one side, and with brickwork and an embankment on the other, with sluices and other contrivances to divert the water into other channels, and for irrigation, and was prepared and formed by *Henry Stainton* at a considerable expence, and the supply of water thus provided and carried in this manner through the grounds added very much to the convenient and profitable occupation, and thereby to the value, of the messuage and premises as well as to their beauty. The quantity of water supplied amounted to about the rate of 50,000 gallons in twenty-four hours.

In or about the month of *April*, 1855, the Metropolitan Commissioners of Sewers, in order to drain a large and populous district within the limits of their commission, commenced the construction of a sewer or drain in the parish of *Lewisham* near to the premises, which was part of a large sewer intended as a main sewer for the draining of the entire district. This sewer or drain was formed in a cutting made along and under the centre of the high road leading from *Blackheath* through *Lewisham* and to *London*, at a depth of sixteen feet and upwards beneath the surface of the soil, and it was carried along the course of the high road, and cut through the bed of gravel or porous earth which in part lies beneath *Springfield*, and is part of the same bed on which the messuage and premises are situate, and through the bed of clay already mentioned as lying under and around that bed of gravel or porous earth, but they did not cut through or touch that part which lay beneath *Springfield*. The sewer or drain was carried in the same direction as the course of the premises for about 510 yards: it in no part touched the premises, and its distance from them at the nearest point was about 17 yards, varying from this in other parts to the distance of 153 yards, and its distance from the pond above described was 83 yards. No part of the sewer or drain was at first made watertight, but about 210 yards in length were subsequently lined with cement, and made watertight in consequence of the remonstrance of the prosecutors, but the remainder, being 300 yards in length, was not so lined, and the water continued to drain out of the gravel bed which was cut through, and in which the drain was constructed, and continues to drain into it. It is not usual nor desirable to make

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sewers watertight throughout, because the making of them watertight very much diminishes their efficiency in draining the lands through which they pass. The sewer was properly designed for attaining the object proposed, and was constructed throughout with care and skill, and of sound and suitable materials.

The immediate effect of the construction of this sewer or drain was to drain all the water from the pond, which on or about the 15th April, 1855, was left empty. The rivulet or stream which had been carried from it through the grounds, and the other ornamental ponds or reservoir which were supplied from it, failed of course, in consequence of the pond being empty, and thus the whole supply of water was withdrawn from the messuage and premises. Complaints were immediately made, at the office of the Metropolitan Commissioners of Sewers, by Mr. Henry Lewin, as the solicitor on behalf of the prosecutors, the owners of the property. But the Commissioners denied their liability to make any compensation for any damage caused by making the said sewer, and, though repeatedly required by the prosecutors to make such compensation, wholly refused to do so.

The case was argued in *Michaelmas Term*, Nov. 19th and 21st.

Lush (*Baddeley* with him), for the prosecutors.—The prosecutors are entitled to compensation under stat. 11 & 12 *Vict.* c. 112. By sect. 38 the Commissioners “shall cause to be made such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining the area within the limits of the commission; . . . and it shall be lawful for” them “to carry any such sewers

through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or through or under any cellar or vault which may be under the pavement or carriage-way of any street, and (if upon the report of the surveyor it should appear to be necessary) into, through, or under any lands whatsoever, making compensation for any damage done thereby as hereinafter provided." Sect. 50, which enacts that the Commissioners shall drain, cleanse, cover, or fill up, &c., all ponds, pools, open ditches, sewers, drains, &c., contains a proviso "that where any work by the Commissioners done or required to be done in pursuance of the provisions of this Act shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby in manner herein provided concerning compensation to persons sustaining damage by reason of the exercise of any of the powers of this Act; or it shall be lawful for the Commissioners, if they shall think fit, to contract for the purchase of such mill, or any such right connected therewith, or other right to the use of water." And by the general compensation clause, sect. 69, "full compensation shall be made out of such rates to be levied under this Act as the Commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." The language of this clause is similar to that in The Public Health Act, 1848, 11 & 12 *Vict. c. 63. s. 144.*, and in The Railways Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 20. s. 16.* But the language of the proviso in sect. 50 is different, and is specially applicable to such a case as

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this, in which the making of the sewer has drawn off the water collected in the prosecutors' pond: it gives compensation for an act interfering with a "right to the use of water," which would not be given under sect. 69. So long as the springs rose in the land of the prosecutors they had a right to use them. [*Wightman J.* The right remains.] There can be no such thing as a right independent of enjoyment; and by reason of the existence of the sewer the water will never come again into the prosecutors' pond.

The cases of *Chasemore v. Richards (a)* and *Acton v. Blundell, in error (b)*, do not apply. Here the Commissioners, before they began their works, did an act which deprived the prosecutors of water which had reached the surface and existed as a flowing stream on their land. In *Chasemore v. Richards (a)* the intercepted water was percolating through the strata of the earth, and had never risen to the surface: no water was drawn off from the river *Wandle*. [*Mellor J.* According to *Dickinson v. The Grand Junction Railway Company (c)*, the prosecutors would have been entitled independently of the provisions of stat. 11 & 12 Vict. c. 112.] That case rested very much on agreement between the parties; and in *Broadbent v. Ramsbotham (c)* *Parke B.* said, "it only decided, that, if a person has a right to a stream *jure naturæ*, he has a right to its subterranean course." In *Acton v. Blundell, in error (b)*, the sinking of the coal pit drew off water which stood in an artificial well and never would have reached the surface.

Further. This drainage is the immediate effect of the act of making the sewer, and would have been actionable

(a) 7 H. L. C. 349.
 (c) 7 Exch. 282.

(b) 12 M. & W. 324.
 (d) 11 Exch. 602 611.

at common law but for the protection given to the Commissioners by their Act. In *Chasemore v. Richards* (a) and *Acton v. Blundell*, in error (b), the well and the coal pit respectively had been sunk by the defendants as proprietors of the adjoining land: in the present case the defendants, if not acting under the powers given to them by statute, would have been indictable, and the prosecutors would have had an action against them. [Cockburn C. J. Is not this damage too remote? The defendants have not touched the soil of the prosecutors, nor affected its position.] The property of the prosecutors is contiguous to the highway, and the defendants, by making the cutting under the highway, through the bed of gravel and the basin of clay, have drawn away a surface stream of water. [He cited *Chamberlain v. The West End of London and Crystal Palace Railway Company* (c).] [Wightman J. Suppose a deep well sunk some distance off, which drained or lowered the water in the pond of the prosecutors.] The prosecutors would have a right of action. They have had uninterrupted user of the right for twenty years, which did not exist in *Acton v. Blundell*, in error (b). [He also cited *Balston v. Bensted* (d).]

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Sir F. Kelly (*Raymond* with him), for the defendants.
—First. The present case is undistinguishable from *Chasemore v. Richards* (a), unless the sewer, besides intercepting the water in the subterraneous strata, drew away water after it had reached the pond of the prosecutors. That case was decided on two grounds; first, that the

(a) 7 H. L. C. 349.

(b) 12 M. & W. 324.

(c) 2 B. & S. 605; affirmed in error, *Id.* 617.

(d) 1 Camp. 463.

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plaintiff, who was owner of a mill on the river *Wandle*, had no property in or right to any water in the river till it had come to his mill, and, secondly, that he could not maintain an action for any act lawfully done which interfered with the water percolating through the subterraneous strata. [He cited the judgment of Lord *Chelmsford*, p. 372, *et seq.*, and *Wightman J.*, delivering the opinion of the Judges, p. 365, *et seq.* In *Acton v. Blundell*, in error (a), it was held that the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, was not governed by the same rule of law as that which applied to and regulated a watercourse flowing on the surface. [He also cited *The New River Company*, appts., *Johnson*, respt. (b).] There is no distinction in respect to the right of the owner between water in a well and water in a pond. Assuming, then, this to be an immemorial natural pond, no action will lie for any act done underground by which the water is drawn off from it. [Cockburn C. J. Suppose that, in *Chasemore v. Richards* (c), a well had been sunk so near the *Wandle* as to draw off water from that river.] The defendants would have been protected by the rule laid down in that case. The prosecutors do not complain of any injury done to the highway. As to the water which was the overflow of the pond, the case does not state that the channel, with artificial works constructed for it by the prosecutors, was the same as existed before; therefore this is not the case of a natural stream of water.

Secondly. The prosecutors are not entitled to compensation under the proviso to stat. 11 & 12 *Vict. c. 11* 12

(a) 12 *M. & W.* 324.

(b) 29 *L. J. M. C.* 93; 6 *Jur. N. S.* 374.

(c) 7 *H. L. C.* 349.

s. 50., the words of which are rather narrower than those in the proviso to sect. 12 of The Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17., on which *The New River Company*, appts., *Johnson*, respt. (a), was decided. Stat. 11 & 12 Vict. c. 112. does not create any new description of right, injury or damage. The damage intended by sect. 50 is legal damage resulting from violation of or injury to a legal right.

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Lush, in reply.—The owner of adjoining land has no right to alter the strata so as to deprive his neighbour of a right which he enjoyed before. Suppose the defendants had caused the land of the prosecutors to sink, they would have had a right of action. As soon as the water rose to the surface the prosecutors had a right to it, and the act of the Commissioners has deprived them of it. *Mellor J.* It is an accident that the water flows into the pond of the prosecutors, by reason of the character and position of the strata. He referred to *Broadbent v. Ramsbotham* (b).] If the prosecutors have no legal right, the proviso in stat. 11 & 12 Vict. c. 112. s. 50. would be useless, unless it applied to cases of the enjoyment of water. *Cockburn C. J.* The proviso only entitles the owners of ancient mills to compensation, though a mill not ancient would be as much injured by an interference with a right connected therewith as an ancient mill: does not that shew that the Legislature only regarded legal rights?] An ancient mill has prescriptive rights which were intended to be protected. But for this proviso the owner of an ancient mill would not be entitled to compensation since the decision in *Chase-*

(a) 29 L. J. M. C. 93; 6 Jur. N. S. 374.

(b) 11 Exch. 602.

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more v. Richards (a). [Cockburn C. J. This statute was passed before that case.] But the Legislature knew what construction the Courts had put upon compensation clauses in Acts of Parliament. The word "right" is used to distinguish the cases intended from those in which the use of the water is only by licence. In *Stainton v. Woolrych, &c. (b)*, Sir John Romilly M. R. dismissed a bill for an injunction to restrain the Metropolitan Board of Works and the *Lewisham* District Board of Works from diverting the water of this pond and the stream flowing from it on the ground that it was a case for compensation under stats. 11 & 12 Vict. c. 112. s. 50. and 18 & 19 Vict. c. 120. s. 86.; and he held that the proviso in sect. 50 was not limited to the previous part of the section. [Wightman J. That case was before *Chasemore v. Richards (a).*]

Cur. adv. vult.

Feb. 21st. The following judgments were now delivered.

MELLOR J. The Court not being agreed on all the points raised by this case, I have to deliver the judgment of my brother WIGHTMAN and myself.

In this case it appeared that the prosecutors were the owners of an estate in fee simple in the parish of *Lewisham* under the will of one *Henry Stainton*. A part of the estate is called *Springfield*, containing about three acres, and is situate upon a deep and extensive bed of gravel, which itself is embedded in a basin of clay, called the *London* clay, and extends not only under *Springfield*, but also under the lands adjoining. *Springfield* was purchased by the testator, and annexed to his

(a) 7 H. L. C. 349.

(b) 23 Beav. 225. 233.

estate in 1835. In the lower part of it was a pond of the depth of four feet, formed in the gravel bed, which had existed there from time immemorial, but which had been enlarged into a small lake, and in which the water rose naturally in a considerable quantity, from several powerful springs at the bottom of it, and thence overflowed the western edge of the clay basin, and formed a rivulet or watercourse which ran through the grounds and supplied other ornamental ponds therein; and was used for the cattle and for supplying the gardens of the house. Considerable expense had been incurred by the testator, in forming and protecting the banks of the rivulet and ponds. In *April*, 1855, the defendants as Commissioners of Sewers, in order to drain a populous district thereabout, commenced the construction of a sewer in the parish of *Lewisham* near to the above premises. This sewer, which was to form part of a large main sewer, was made in a cutting, along and under the centre of the high road from *Blackheath* to *Lewisham* through the bed of gravel which, in part, lies beneath *Springfield*, and also through the basin of clay which incloses the said bed of gravel. The cutting in question no where approached nearer to the estate of the prosecutors than 17 yards, varying from that distance to 153 yards. The sewer was dug and properly made for attaining its object, and constructed with care and skill. The immediate effect of the construction of the sewer was, to drain the springs rising in the bed of gravel, and to prevent them from finding their way into the prosecutors' pond or lake, so that the same became dry, and the rivulet ceased to be supplied with water, and in its turn to supply the other ponds on the estate. Complaints were forthwith made on the part of the prosecutors to the defendants, and the question is whether, at

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common law is by the provisions of the 11 & 12 Ed.
2 c. 12 & 13. It is either of them. The provisions
entitled to compensation from the defendant in case
of the abstraction of the water is however intended for
the point of sale.

We have fully considered the arguments which we
urged with great force by Mr. Lush in support of the claim
but we cannot yield to them. We think that the case is,
in principle, not to be distinguished from that of *Chambers
v. Richards*, which appears to us conclusively to govern
it. In that case *Wrightson J.*, in delivering the *majority*
opinion of the Judges, says, p. 370-1, "The question
then is, whether the plaintiff has such a right as he claims
jure nature to prevent the defendant sinking a well in his
own ground at a distance from the mill, and so absorbing
the water percolating in and into his own ground beneath
the surface, if such absorption has the effect of diminish-
ing the quantity of water which would otherwise find
its way into the river *Wandle*, and by such diminution
affects the working of the plaintiff's mill. It is impos-
sible to reconcile such a right with the natural and ordi-
nary rights of landowners, or to fix any reasonable limits
to the exercise of such a right. Such a right as that
contended for by the plaintiff would interfere with, if not
prevent, the draining of land by the owner." We entirely
concur in this view of the law, and consider it to be
strictly applicable to the circumstances of the present
case. The effect of a decision in favour of the prosecu-
tors on this ground, would be to cast a burthen on the
land of all adjoining owners of the most serious descrip-
tion. The distinction between abstracting water when
collected in rivers or flowing streams, and the intercep-
tion of underground springs by an owner digging in his

own land, is clearly pointed at by *Tindal* C. J. in the case of *Acton v. Blundell*, in error (a), and it is unnecessary to do more than refer to that authority.

It was however, contended by Mr. *Lush* that, by virtue of section 50 or section 69 of the above mentioned statute, the prosecutors were entitled to compensation either as for a "damage by reason of the exercise of any of the powers of the Act" within the terms of the latter section, or under the proviso to the 50th section, which provides that "where any work of the Commissioners done or required to be done in pursuance of the provisions of this Act shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby." A number of decisions (see *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912; *Re Penny and The South Eastern Railway Company*, 7 E. & B. 660) upon similar provisions in statutes of this description have established that the damage for which compensation is required to be made is damage which could have been the ground of an action at law if the act occasioning it had been done without the authority of an Act of Parliament. *The New River Company*, appts., *Johnson*, respt. (b), is not only in point as to this, but is also a decision of this Court upon the first ground to which we have adverted. With reference to the proviso in the 50th section it will appear, upon examination, not to extend the claim to compensation beyond the words of the 69th section, and applies in terms to ancient mills, or any rights connected therewith, or other rights to the use of water. If it had been intended to give

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(a) 12 M. & W. 324. 347.

(b) 29 L. J. M. C. 93; 6 Jur. N. S. 374.

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compensation for damage in the popular sense, why limit it to *ancient* mills, or *rights* connected therewith, or *rights* to the *use of water*? In a popular sense the damage by abstraction of water is as great to a mill which has existed nineteen years as to one which has existed twenty years, and a right to the use of water does not in terms appear to apply to water percolating through the soil, but to the diversion of water when actually collected in a course or stream. The decisions upon provisions of this description do all, so far as we are aware, support the principle that compensation is only to be given in respect of what would, independently of the statutes, have formed actionable injuries, and it appears to us that these provisions as to compensation were not intended to enlarge the rights of owners of property. What may have been the main object of the proviso it is difficult to say, as it seems in its terms rather to restrict the words of the 69th section than to enlarge them.

But then it is said by Mr. *Lush* that, inasmuch as the act done by the Commissioners in the highway would have been a public nuisance but for the statute, his clients are entitled to compensation for a damage resulting from an act only made lawful by the statute. We cannot see how this varies the question. An action could only have been maintained by the prosecutors by reason of the interference with the highway for some special injury resulting to them from the right to use the highway *as a highway*, unless the excavation made by the defendants had incidentally affected some right to support or some other right of property; otherwise the resulting damage would still have been *damnum absque injuria*.

For these reasons we are of opinion that our judgment must be for the defendants.

COCKBURN C. J. We reserved our judgment in this case with the view to consider two points : first, whether, upon the facts, the case came within the rule of law established by the decision in *Chasemore v. Richards* (a); secondly, whether, if the facts brought the case within that rule, the prosecutors might, nevertheless, under the peculiar enactments of the 11 & 12 Vict. c. 112., be entitled to compensation for the damage they had undoubtedly sustained by reason of the work executed by direction of the defendants.

Upon the first point, after a careful consideration of the facts stated, I have come to the conclusion that the case falls within the rule in *Chasemore v. Richards*. I think it sufficiently appears that the effect of the drain made by the defendants is to tap the water, which would otherwise rise in the prosecutors' pond, while flowing in the subterranean channels of the ground and before it rises to the surface in the tangible form of a stream or appreciable body of water. The case, therefore comes within the rule established in *Chasemore v. Richards*, and, consequently, had the act complained of been that of an adjoining proprietor, no action could have been maintained for the damage sustained by the prosecutors. Now, according to the law, as settled by recent decisions, where compensation is given by an Act of Parliament for damage arising from the execution of works done under statutory powers, such compensation can be claimed only where the damage would have been ground of action if arising from the act of a private individual; the purpose of such enactments being to prevent the statutory power from operating to the injury and loss of an individual where property is damaged by such power

(a) 7 H. L. C. 349.

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being set up in answer to an action. If, therefore, the claim to compensation in the present case arose under the general compensation clause, in the 69th section of the Act now under our consideration, the claim would undoubtedly fail.

But a question has been raised whether, under the peculiar provisions of this statute, a claim for compensation in respect of a right to water does not stand on a different footing. In addition to the general provision contained in the 69th section of the Act, for full compensation to persons sustaining damage by reason of the exercise of any of the powers given by the Act, the 50th section after conferring on the Commissioners powers with reference to drains and sewers, provides that "where any work by the Commissioners done or required to be done in pursuance of the provisions of this Act shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made." It has been contended that this special provision with reference to rights to water shews that the intention of the Legislature was to give compensation in all cases in which damage might arise with reference to rights to water from works done under the Act, whether such damage, if occasioned by works done by an adjoining proprietor, would have been actionable or not. I am disposed to think that this is the right construction of the Act. The fact that the section of the Act which gives powers as to making drains and sewers contains a special proviso as to compensation in terms differing from the language of the general compensation clause appears to me to lead to the conclusion that the Legislature intended to make a special provision in the case of inter-

ference with water rights. It has, indeed, been suggested that the proviso appended to the 50th section may have been added when the bill was in committee by some member of the Legislature who was not aware of the general provision of the 69th section; but I do not think we are at liberty to speculate on such a possibility. Finding two distinct enactments, we are bound to assume that each was intentionally inserted in the Act; and, finding the language of the sections altogether different, we must, I think, infer that the Legislature meant to make a different provision in the two cases, and we must endeavour to ascertain what that meaning was. The effect of a general provision for compensation, as contained in the 69th section, has been settled by judicial decisions; but it remains for us to ascertain the meaning and effect of the very different language of the proviso in the 50th section.

Now, the proviso in question enacts that full compensation shall be made wherever any right to the use of water shall be *interfered with or prejudicially affected*. I cannot but think that these words are intended to have, and should be held to have, a wider scope and more extensive meaning than, according to judicial exposition, is to be given to the terms of the 69th section. No doubt it may be said that, in point of law, the right to the use of this water commences only when the water has risen to the surface and presents itself in a collective and tangible form; and that as, by what has now been done, the water is prevented from ever assuming that condition, no legal right to the use of the water is *interfered with and prejudicially affected*. But the effect of this reasoning would be, as it seems to me, to limit the operation of the proviso of the 50th section to the

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narrower meaning of the 69th, which, for the reasons already given, cannot, I think, have been the intention of the Legislature. Looking to the general and comprehensive language of the 50th section, I cannot think that the term "right" was there used in the technical and limited sense referred to. When this water had once risen, the prosecutors had an undoubted right in it. That right has been, I think, *interfered with and prejudicially affected* within the meaning of the 50th section.

I am therefore of opinion that a peremptory writ of mandamus ought to go to assess the compensation payable to the prosecutors in respect of the loss they have sustained.

Judgment for the defendant

*Saturday,
 February 21st.*

**MARSHALL against The ULLESWATER STEAM
 NAVIGATION COMPANY (LIMITED.)**

*Several fishery.
 Soil of lakes.
 Presumption.
 Prerogative.*

1. The allegation of a several fishery, *prima facie*, imports ownership of the soil: per *Wightman* and *Mellor JJ.*; *Cockburn C. J.* dissenting but holding *this* Court bound by the authorities to that effect.

2. *Quære*, whether the soil of lakes, like that of fresh water rivers *prima facie* belongs to the owner of the land or of the manors on either side, *ad medium filum aquæ*, or whether it belongs to the king in right of his prerogative?

THE first count of the declaration alleged that the defendants on divers days and times broke and entered certain land of the plaintiff covered with water, being a part of *Ulleswater Lake*, abutting partly on certain land of one *Henry William Askew*, and partly on certain other land of the plaintiff, and partly on certain land of one *Henry Howard*, and with steamboats of the defend

ants, came into and upon, and sailed upon and over the said land covered with water, to and from a certain pier or jetty of and belonging to the plaintiff, and wrongfully caused divers persons to go upon the said pier or jetty, and there to embark or disembark from the said steamboats, and wrongfully caused the said persons to sail in the said steamboats upon and over the said land covered with water, and by means of the said steamboats so navigating there, and the disturbance of the waters there occasioned by the same, disturbed, destroyed, and drove away the fish of the plaintiff there then being.

The second count alleged that, before and at the time of the grievances hereinafter mentioned, the plaintiff was possessed of certain several fisheries in certain parts of a certain lake or land covered with water called *Ulleswater Lake*, and the defendants wrongfully caused certain steamboats to be navigated, used and propelled in and upon, and over the said lake, and the said parts thereof, and by means thereof stirred up and disturbed the waters of the said lake and the said fisheries of the plaintiff, and the defendants, in and about and whilst navigating the said steamboats, there cast and threw into and upon the said lake and fisheries, divers large quantities of ashes, cinders, dust and other noxious refuse and materials. And the plaintiff says that, by means of the premises, the fish of and in the said fisheries were disturbed driven away and destroyed, and thereby the plaintiff could not have and enjoy the said fisheries in as ample and beneficial a manner as he ought to have done, and otherwise might and would have done, and lost and was deprived of the benefit and profit of his said fisheries.

The declaration concluded by claiming 100%.

Pleas. First. To the whole declaration, not guilty.

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Second. To the first count, that the land on which the trespasses were alleged to have been committed was not the land of the plaintiff.

Third. To the same, that before, and at the times of the committing the acts complained of, there was, and of right ought to have been, a certain common and public highway, into, through, over and along the land in which &c., for all the liege subjects of the Queen to sail, navigate, pass and repass, with boats, vessels, and steamboats, at all times of the year at their free will and pleasure, and that the acts complained of were an use by the defendants of the said highway.

Fourth. To the second count, that the plaintiff was not possessed of the several fisheries, nor of any of them.

Fifth. To the same, except to so much as charged the defendants with casting and throwing into and upon the lake and fisheries the ashes, cinders, dust and other noxious refuse and materials, that, before and at the time of committing the acts complained of, there was, and of right ought to have been, a certain common and public highway into, through, over, and along the said lake, and the parts in which were the alleged fisheries of the plaintiff, for all the liege subjects of the Queen to sail, navigate, pass and repass, with boats, vessels, and steamboats, at all times of the year, at their free will and pleasure, and that the acts complained of were an use by the defendants of the said highway.

Sixth. To the same, that the parts of the lake in which were the alleged fisheries of the plaintiff were, at the times of the committing of the acts complained of, the soil and freehold of divers persons, and that the defendants caused the said steamboats to be navigated, used and propelled in and upon and over the said lake, and

the said parts thereof, by the leave and in the exercise of the rights of such last mentioned persons as such owners of the soil and freehold of the said parts of the said lake as aforesaid, and that the acts complained of were necessarily done by the defendants in so causing the said steamboats to be navigated, used, and propelled as aforesaid, and not otherwise; and the defendants did no more than they were authorized to do in the exercise of the said rights, and the said acts complained of were committed by the defendants on no other occasions and for no other purposes than as aforesaid.

Seventh. To the whole declaration, that the defendants committed the acts complained of by the plaintiff's leave.

Eighth. To the first count, so far as it related to the acts complained of in respect of and as to and concerning the said pier or jetty that the said pier or jetty was not the plaintiff's.

Replications. First. The plaintiff took issue on all the pleas.

Second. As to the third, fifth, and sixth pleas, that the plaintiff sued not only for the trespasses and grievances in those pleas admitted, but also for trespasses and grievances committed by the defendants in excess of the alleged rights, and also in other parts of the said land and lake and on other occasions and for other purposes than those referred to in those pleas.

There was also a demurrer to the sixth plea.

The defendants joined issue on all the pleas, and pleaded to the new assignment not guilty, and joined in demurrer to the sixth plea.

The plaintiff joined issue on the plea to the new assignment.

The issues in fact were tried, before *Martin B.*, at the Summer Assizes for *Westmoreland*, 1861, when it ap-

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peared that the plaintiff sued as lord of the manor of *Glenridding*, bordering on the *Ulleswater Lake*, and that the defendants were a Company incorporated under The Joint Stock Companies Act, 1856, 19 & 20 *Vict. c. 47.*, for the purpose of running steam boats on that lake, and that for the embarkation and landing of passengers they had erected a pier, part of which was on its soil or bed. The plaintiff claimed the ownership of the soil and freehold of that portion of the lake where the pier or jetty was erected and over which the steam boats passed, by virtue of a right of several fishery therein.

The evidence and admissions in the cause shewed that the barony of *Barton* included that portion of the lake of *Ulleswater* which is within the county of *Westmoreland*, extending as it appeared to about the middle of the lake; and it would seem that before the reign of King *Edward* the First, and before the statute "*Quia Emptores*" and the declaratory extensions thereof by the statutes of *Edward* the Second and *Edward* the Third, the manor of *Patterdale* with other manors, were by subinfeudation carved out of the barony of *Barton*, and apparently the manor of *Patterdale* had assigned to it that portion of the lake called *Ulleswater Head*, which comprises within its boundaries the locus in quo; and that by another subinfeudation the manor of *Glenridding* was carved out of the manor of *Patterdale*.

By an indenture, bearing date the 12th *January*, 10th *Charles* the First (1635), made between *Richard Threlkeld* and others (the then lords of the manor), of the one part, and *Lancelot Dawes* and others, the then tenants of the manor and lordship of *Glenridding*, in *Patterdale*, in the county of *Westmoreland*, of the other part, the customs of the manor are declared and confirmed.

By deed of the 12th *August*, 1640 (16 *Car. 1*), *R.*

Threlkeld and others conveyed to Mrs. *Joanna Mounsey*, widow, her heirs and assigns, the manor of *Glenridding* with the appurtenances.

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By deed of 19th *October*, 1741, *Edward Hodgson*, of *Blawick*, in *Patterdale*, in consideration of 2l. 2s., gave, granted, aliened, bargained, sold, enfeoffed and confirmed unto *George Mounsey*, of *Patterdale Hall*, his heirs and assigns for ever, "all that part of his the said *Edward Hodgson's* fishery in *Hullswater Head*, situate and being on the west side of the mouth of the river *Goldrill*, called *The Eah*, (that is to say), from the eastern bank or shore of the said river westward, through *Parkside Field*, as far as the said fishery extendeth; together with all the right, title, interest, claim and demand whatsoever which the said *Edward Hodgson* now hath of in and unto the same or any part thereof; To have and to hold the said fishery, or part of a fishery, limited and bounded as above mentioned, unto the said *George Mounsey*, his heirs and assigns, for ever, Yielding and Paying therefor yearly and every year, unto *Edward Hassell*, Esq., his heirs and assigns, on the usual rent days, a yearly free rent of fower pence."

The above deed was indorsed as follows:—"Be it remembered, that on the 2nd day of *February*, 1741, possession and seizin of all the within granted premises was given to *George Mounsey* by *Jonathan Jackson*, according to order and directions of *Edward Hodgson*, in the presence of" &c.

By deed of 28th *August*, 1807, certain premises described as being in *Glenridding* in *Patterdale* had been conveyed by *John Mounsey*, of *Patterdale Hall*, a descendant of *George Mounsey*, to the Rev. *Henry Askeu*, his heirs and assigns, for ever, Yielding and Paying therefor

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yearly and every year, unto the said *John Mounsey*, his heirs and assigns, the yearly free or quit rent of 2s. The deed further contained a covenant by *John Mounsey*, that it should be lawful for *Henry Askew*, his heirs and assigns, "to take and kill fish by angling in any part of the fishery of him the said *John Mounsey*, in the lake of *Uleswater*; and for the purpose of taking and killing of fish as aforesaid to enter with boats upon such part or parts of the said lake whereto the fishery of him, the said *John Mounsey*, extends, or otherwise to take fish from the shore by angling; And also to take and kill fish with draught nets in and upon that part of the said *John Mounsey's* fishery in *Uleswater* aforesaid, which lies directly opposite to that part of the tenements hereby conveyed which adjoins the lake of *Uleswater*, without, however giving to the said *Henry Askew*, his heirs and assigns, any other or further right than to go directly out from the tenement so conveyed to him, and drawing thereto, and landing thereon: Provided that these presents, nor anything herein, shall give to the said *Henry Askew*, his heirs or assigns, any right or power to use driving nets, or any other right or power than to take and kill fish by angling or with draught nets such as are now in use only, as aforesaid, nor to set up or to use any carriage, boat, nor in manner to evict, claim title to, or injure, the said *John Mounsey* in the freehold and enjoyment of the said fishery otherwise than as above mentioned."

The court rolls of the manor of *Patterdale*, member of the barony of *Barton*, were produced, and it appeared by entries therein, that on the 28th *July*, 1783, in a survey or rental of that manor, *John Mounsey*, Esq., was a freeholder of the manor. He was described, under the head of "Tenements out of which the rent issues," as

chargeable with (amongst other rents) the rent of 4*d.* for part of *High Blawick* Fishery ; and under date of the 19th July, 1809, *John Hodgson* and *Anthony Harrison* were each charged with a rent of 1*s.* 6*d.* in respect of “ *Lower Blawick* Fishery” and “ *High Blawick* Fishery.”

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By deed of 2d December, 1823, *John Mounsey* (a descendant of the *George Mounsey* of the deed of 1741), of *Patterdale Hall*, for the consideration of 10,233*l.*, “ granted, bargained, sold, aliened, released, and confirmed to *William Marshall*, of *Hallsteads* (the plaintiff, party of the fourth part to that deed), the manor of *Glenridding*, with the rights, members, and appurtenances thereto belonging” &c. ; and “ all that fishing, or right of fishing, in the lake of *Ulleswater* aforesaid, situate and being on the west side of the mouth of the river *Goldrill*, called *The Eah*, (that is to say), from the eastern bank or shore of the said river westward through *Parkside Field* to *Stybarrow*, which said fishery is subject to the payment of a free or quit rent of 4*d.* to the said *Edward Hassell*,” &c.

The site of the pier erected by the defendants was partly comprised within the limits of the fishery conveyed by this deed.

On the 18th July, 1859, *Henry W. Askew*, who was then owner of the property conveyed to the Rev. *Henry Askew* by the deed of 28th August, 1807, leased to the defendants a portion of the property adjoining the lake, for the purpose of enabling them to erect a pier thereon for landing and receiving passengers and goods from and on board of steam boats plying on the lake. Part of the pier was built on it.

It further appeared that, as far back as human memory went, all persons having property on the lake, or having

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lawful access to it, were accustomed to use the privilege of going and being conveyed on the lake in boats, with or without goods, and landing where they might.

The jury found a verdict for the plaintiff with 1s. damages, the learned Judge reserving leave to move to enter a verdict for the defendants on the ground that, on the evidence and facts taken to have been found by the jury, the several issues in the cause ought to have been found in favour of the defendants.

Pickering, in *Michaelmas* Term, 1861 (*November* 6th), obtained a rule accordingly.

This rule was argued in *Michaelmas* Term, 1862, before COCKBURN C. J., WIGHTMAN and MELLOR JJ.; on the 13th, 21st and 24th *November*.

Manisty, *Mellish* and *T. Jones* (Northern Circuit) shewed cause.

Pickering, *T. D. Salmon*, and *Kemplay* supported the rule.

The questions and arguments fully appear in the judgments. The following were the authorities referred to:—*Co. Litt.* by *Hargrave* and *Butler*, 4 b; 47 a, note (284); 122 a, note (181); 160 a; *Fitz. Abr. Assise*, pl. 422; *Com. Dig. Copyhold* (Q. 2), *Navigation* (A.) and *Piscary* (A.); *Vin. Abr. Warren* (F.) 3; *Bac. Abr. Rent* (B.), 7th ed.; *Shepp. Touchst.*, 127, 137, 8th ed.; 2 *Blackst. Com.* 39–40; *Coote on Landlord and Tenant*, 131; *Bell's Principles of the Law of Scotland*, p. 171, § 648, 3d ed.; 3 *Kent. Com.* 427*–432*, note (a) p. 427*, and note (a) p. 429*, 8th ed.; *Phear on the Rights of Water*, 12–13, 63; *Bowlston v. Hardy* (a); *Le Case del Royall Piscarie de le Banne* (b); *Choppinus*

(a) *Cro. Eliz.* 547.

(b) *Dorr.* 55.

de Domatio Franciæ, lib. 1, titul. 6, there referred to, p. 58; *Smith v. Kemp* (a); *Rex v. The Inhabitants of Old Alresford* (b); *Rex v. Ellis* (c); *Scratton v. Brown* (d); *The Duke of Somerset v. Fogwell* (e); *Doe d. Pring v. Pearsey* (f); *Morris v. Dimes* (g); *Williams v. Wilcox* (h); *Holford v. Bailey* (i); *Simpson v. Dendy* (k); *Berridge v. Ward* (l); *Lord v. The Commissioners for Sydney* (m); *Lamb v. Newbiggin* (n); *Lady Hamilton v. The Marquis of Donegall*, in error (o); *The Lord Advocate v. Hamilton* (p); *Sir Robt. Menzies v. Macdonald (General)* (q); *The Duke of Devonshire v. Hodnett* (r); *Lord Templemore v. Allen* (s); *Little v. Wingfield* (t).

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Cur. adv. vult.

Judgment was now delivered as follows.

WIGHTMAN J. I proceed to deliver the judgment of my brother MELLOR and myself.

The evidence in this case was of a very indecisive character, and we have felt some doubt as to the decision at which we ought to arrive. Upon the argument on the rule, several questions were discussed which it is not necessary for us to determine, as we must dispose of this

(a) 2 *Salk.* 637; 8 *C. Carth.* 285.

(c) 1 *M. & S.* 652.

(e) 5 *B. & C.* 875.

(g) 1 *A. & E.* 654.

(i) 8 *Q. B.* 1000; reversed on error, 13 *Id.* 426.

(k) 8 *C. B. N. S.* 433.

(m) 12 *Moo. P. C. C.* 473.

(o) 3 *Ridg. Cas. in Parl.* 267.

(q) 2 *Macq. H. L. C.* 463.

(s) 8 *Irish Law Rep.* 199.

(b) 1 *T. R.* 358.

(d) 4 *B. & C.* 485.

(f) 7 *B. & C.* 304.

(h) 8 *A. & E.* 314.

(l) 10 *C. B. N. S.* 400.

(n) 1 *C. & K.* 549.

(p) 1 *Macq. H. L. C.* 46.

(r) 1 *Hud. & Br.* 322.

(t) 8 *Irish Com. Law Rep.* 279.

1863. case upon the evidence and admissions which were given at the trial. Whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *primâ facie* to the King, in right of his prerogative, (*Com. Dig., Prærogative* (D. 50) ; *Hale de Jure Maris*, c. 1), it is not in this case necessary to determine ; for it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishery therein, be specially appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto. It may be inferred from the evidence and admissions in this case, that the barony of *Barton* included that portion of the lake of *Ulleswater* which is within the county of *Westmoreland*, extending as it appears to about the middle of the lake ; and it would seem that before the reign of King *Edward* the First, and before the statute "*Quia Emptores*" (2 *Bl. Com.* 91), and the declaratory extensions thereof by the statutes of *Edward* the Second and *Edward* the Third, the manor of *Patterdale* with other manors, were by subinfeudation carved out of the barony of *Barton*, and apparently the manor of *Patterdale* had assigned to it that portion of the lake called *Ulleswater Head*, which comprises within its boundaries the locus in quo ; and that by another subinfeudation the manor of *Glenridding* was carved out of the manor of *Patterdale*. It appears to us that the manor of *Glenridding* did not include any portion of the lake, or any property therein ; for in the conveyance of the 12th *August*, 1640, from Mr. *Richard Threlkeld* to Mrs. *Joanna Mounsey*, there is no mention of any interest in the lake of *Ulleswater* ;

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but by the deed of feoffment of 1741, made between *Edward Hodgson*, of *Blawick*, in *Patterdale*, and *George Mounsey*, of *Patterdale Hall*, the former, for the consideration therein mentioned, aliened, bargained, sold, enfeoffed and confirmed unto *George Mounsey*, his heirs and assigns for ever, "all that part of his, the said *Edward Hodgson's* fishery in *Hullswater Head*, situate and being on the west side of the mouth of the river *Goldrill*, called the *Eah*, that is to say, from the eastern bank or shore of the said river westward, through *Parkside Field*, as far as the said fishery extendeth, yielding and paying therefor, yearly and every year, unto *Edward Hassell*, Esq., his heirs and assigns, on the usual rent days a yearly free rent of fower pence." Upon this deed of feoffment livery of seisin appears to have been duly made. It further appears from the extracts from the court rolls of the manor of *Patterdale*, member of the barony of *Barton*, under date the 28th *July*, 1783, that in a survey and rental of the said manor, the name of *John Mounsey*, Esq., was included amongst the freeholders of such manor; and under the head of "Tene-ments out of which the rent issues" we find him chargeable with several rents, amongst which is the rent of 4*d.* for "part of *High Blawick Fishery*;" and under date of the 19th *July*, 1809, we find *John Hodgson* and *Anthony Harrison* each charged with a similar rent of 1*s.* 6*d.* in respect of "*Low Blawick Fishery*" and "*High Blawick Fishery*." Now in the feoffment of 1741 the description of fishery is left uncertain; but, inasmuch as the deed which conveyed it was a feoffment with livery of seisin duly indorsed, and as it was conveyed subject to a free rent of four pence to Mr. *Hassell*, then lord of the manor of *Patterdale*, and which it appears from the court rolls

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of that manor was subsequently duly rendered, we are driven to the conclusion that the fishery conveyed must have been a several fishery, and presumably include the soil thereof. A feoffment with livery of seisin would not be appropriate to the conveyance of an incorporeal right, although it might if the livery were "*secundu formam chartæ*" so operate (*Com. Dig.*, tit. *Feoffm* (A. 2)); and a free rent of 4*d.* was incapable of being reserved out of an incorporeal inheritance by a common person; *Co. Litt.*, by *Hargrave* and *Butler*, 47 *a.* note (284 *Com. Dig.*, *Rent* (B. 3); *Bac. Ab.*, *Rent* (B.). Mr. Pickering, in his able argument, relied very much on certain expressions in the judgment of this Court in *The Duke of Somerset v. Fogwell* (a), in which it was held that a several fishery in a navigable river, created before Magna Charta did not carry with it the ownership of the soil, but was an *incorporeal*, and not a territorial franchise; and he relied upon the passage from *Co. Litt.* 4 *b.*, there cited "If a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soil doth not passe." The doctrine of this passage has been the subject of much controversy, as appears from note (2) commenting upon it, and note (181) commenting upon *Co. Litt.* 122 *a.*; and it must now be taken as established by the authority of *Holford v. Bailey* (b), that "the allegation of a several fishery, *prima facie*, imports ownership of the soil, though they are not necessarily united." In the same case, in error, Parke B. in delivering the judgment of the Court (13 Q. B. 444—5), says:—"A several fishery is no doubt, *prima facie*, to be assumed to be in the soil of the defendant

(a) 5 B. & C. 875. 884.

(b) 8 Q. B. 1000. 1016.

and therefore *liberum tenementum* is a good plea ; and the plaintiff must reply by shewing a grant of a several fishery or a prescriptive right to one." These decisions are in conformity with the rule stated in the later editions of *Blackstone's Commentaries*, vol. 2, p. 39 : "He that has a several fishery must also be (or at least derive his right from) the owner of the soil." The case of *The Duke of Somerset v. Fogwell* (a) in no sense conflicts with these authorities. It was a several fishery in a navigable river within the flux and reflux of the tide, and the presumption, in the absence of proof to the contrary, was, under the circumstances, that the soil of the river remained in the king ; and although there are expressions adopting the passage in *Co. Litt.*, that, as between subject and subject, "a grant, followed up by livery, which properly applies to a thing corporeal, did not convey the soil, livery being made *secundum formam chartæ*," we think that these expressions must be interpreted with reference to the circumstances of that case. It appears to us that, in the absence of proof to the contrary, we ought in this case to presume, from the fact of the reservation of "a free or quit rent," that such an estate must have been originally conveyed by the owner of the manor of *Patterdale* to some predecessor in title to *Hodgson*, the party conveying by the feoffment of 1741, as that such a rent could be reserved out of it, and inasmuch as such a rent could not be reserved by a common person out of an incorporeal inheritance, a corporeal inheritance must be presumed to have been granted, and we think that the feoffment of 1741, which affected to convey the fishery in question, subject to the usual "free rent of fower pence," to Mr. *Hassell*, operated

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to convey the same estate to *George Mounsey* as was possessed by *Hodgson*. In this view of the case, the stipulation in the conveyance of 1807 by *John Mounsey* to the Rev. *Henry Askeu* (under whom the defendants claim), carefully guarding the limited grant of a right to fish in his fishery in *Ulleswater Lake*, so as not to "injure the said *John Mounsey* in the freehold and enjoyment of the said fishery otherwise than as above mentioned," becomes intelligible and consistent.

Inasmuch, therefore, as the pier in question has been erected upon the soil of that part of the lake which is comprehended in the fishery conveyed to Mr. *Marshall* by the deed of *December*, 1823, subject to the free or quit rent of four pence to Mr. *Hassell*, the present lord of the manor of *Patterdale*, we think that our judgment must be for the plaintiff, and the rule obtained by Mr. *Pickering* must be discharged.

COCKBURN C. J. I am desirous to have it understood that in concurring with my learned brothers in discharging this rule, I am acting, not upon my own conviction, but in deference to authorities, by which, sitting here, I deem myself bound, but which, if I were sitting in a Court of appeal, I should consider myself called upon to canvass.

I agree with the rest of the Court in thinking that if the right to a several fishery, as such, is consistent with the ownership of the soil,—à fortiori if primâ facie it is to be taken as implying such ownership—there is evidence in this case, in the reservation of the quit rent and the fact of the grant of the fishery to the plaintiff's predecessor having been accompanied by livery of seisin, to lead to the conclusion that

the ownership of the soil was here united with the several fishery. My difficulty arises from my inability to assent to the doctrine that upon the grant of a several fishery the ownership of the soil and the right of fishery are to be taken to be united. It is certain that both *Bracton* and Sir *E. Coke* considered a several fishery as a thing essentially distinct from the ownership of the soil. Lord *Coke* (*Co. Litt.* 4 *b.*) expressly lays it down that by the grant of a several fishery, even when accompanied by livery of seisin *secundum formam chartæ*, the soil does not pass, but, if the water becomes dry, the grantor shall have the soil. The language of Lord *Coke* is precise and positive, and is well deserving of attention. He says:—"If a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soile doth not pass, nor the water, for the grantor may take water there; and if the river become drie, he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ*, cannot enlarge the grant. For the same reason, if a man grant *aquam suam*, the soile shall not passe, but the pischary within the water passeth therewith."

Now, independently of the high authority of Lord *Coke* on such a matter, I must say that this doctrine appears to me the only one which is reconcilable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should such a fishery be considered as carrying with it, in the absence of negative proof, the property in the soil? On the contrary, it seems to me that there is

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every reason for holding the opposite way. The grant of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land, the water and the incidental and accessory right of fishing would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land once, leaving the accessory to follow? Why grant the accessory that the principal may pass incidentally? Surely such a proceeding would be at once illogical and unlaywerlike. The greater is justly said to comprehend the less, but this is to make the converse of the proposition hold good. A grant of land carries with it, as we all know, the mineral which may be below the surface. But who ever heard of a grant of the mineral carrying with it the general ownership of the soil? Why should a different principle be applied to the grant of a fishery, which may be said to be a grant of that which is above the surface of the soil, as a grant of the mineral is a grant of that which is below it? Nor should it be forgotten that the opposite doctrine involves the startling and manifest absurdity that should the water be diverted by natural causes or become dry, the fishery, which was the primary and principal object of the grant, would be gone, and the property in the soil which only passed incidentally and as accessory to the grant of the fishery, would remain.

I must further observe that, if I felt myself at liberty to follow my own view of the law in this respect, I should not feel any serious difficulty in dealing with the two principal facts relied on as supporting the position that the property in the soil passed with the grant of the fishery. It may be that,

in strictness, a quit rent is not properly reservable on the grant of an incorporeal hereditament. But, if the law were clear that the grant of a several fishery carried with it no right to the soil, the fact that a quit rent had been reserved by the lord of the manor by whom the grant was originally made would only shew that the parties had been mistaken in supposing that a quit rent could be reserved on such a grant. So, again, the fact that livery of seisin had been resorted to to give effect to the grant would only shew that the parties erroneously supposed that this form of conveyance was necessary, or at all events was available to effect their purpose. These things would not, to my mind, convert a grant of the use of the surface of the soil for a specific purpose into a grant, inferentially, of the soil itself. Indeed, in the case put by Lord *Coke*, he assumes that the grant of the fishery has been accompanied by livery of seisin, yet lays it down that this will not have the effect of making the freehold in the soil pass.

Nevertheless, however strong may be my own opinion on this question I think the authorities on it are too cogent to be overruled except in a Court of appeal. In *Holford v. Bailey* (a), Lord *Denman*, in delivering the considered judgment of this Court, says, p. 1016, "No doubt the allegation of a several fishery, *primâ facie*, imports ownership of the soil, though they are not necessarily united." And the same doctrine is enunciated by *Parke* B., in delivering the judgment of the Court of Exchequer Chamber in the same case (b). And though, in both instances, the doctrine may be said to have been extra-

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(a) 8 Q. B. 1000.

(b) 13 Q. B. 426. 444.

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judicial, as being unnecessary to the decision, which turned on the question whether trespass would lie for disturbance of a several fishery, the affirmative of which was held on grounds altogether independent of the ownership in the soil, yet it cannot be denied that these dicta occurring in the considered judgments of the Courts are entitled to very great weight. And in the learned note to fol. 122 a. of *Hargrave* and *Butler's* edition of *Coke upon Littleton*, the annotator, after passing in review the conflicting authorities on this subject, concludes—I cannot but think contrary to the effect of his own reasoning—that the true doctrine on this subject is that a several piscary is presumed to comprehend the soil till the contrary appears. I feel that in disposing of this rule we ought to yield to the authority of these opinions, but entertaining myself individually a very different view, I am desirous to have it known that while I submit to them I am far from acquiescing in them.

Rule discharged.

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IN THE EXCHEQUER CHAMBER.

BEHN *against* BURNES.Tuesday,
February 24th.

Warranty.
Condition
precedent.
Representation.
Descriptive
averment.
Functions of
Judge and
jury.
Construction.
Pleading.
Charter party.
Marine in-
surance.

1. In policies of insurance and charter parties, the word "warranty" is synonymous with "condition." Per Erle C. J., Pollock C. B., Williams and Keating JJ., and Channell B.

2. A "representation" is a statement, or assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it. Per the same Judges.

3. Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. Per the same Judges.

4. Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the Court, and not the jury, must determine. Per the same Judges.

5. When that question is raised by pleading, the Court may, in aid of the construction, take into consideration the surrounding circumstances; such as the circumstances under which, and the purposes for which, the charter party was entered into: aliter if the question is raised by demurrer or on an application for judgment non obstante veredicto. Per the same Judges.

6. If the former, the question arises whether that part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. Per the same Judges.

7. With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or non performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. Per the same Judges.

8. The position that a statement of this kind in a charter party which may be regarded as a mere representation if the object of the charter party be still practicable, may be construed as a warranty, if that object turns out to be frustrated, denied to be law. Per the same Judges.

9. By memorandum of charter party, dated London, it was agreed between A. B., therein described as "owner of the good ship or vessel called *The M.*, of 420 tons or thereabouts, now in the port of Amsterdam," and C. D., that the said ship, being tight, staunch, strong, and every

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way fitted and ready for the voyage, should, "with all possible despatch, proceed direct to N. &c." In an action by the ship owner against the charterer for not loading the agreed cargo: held, by *Erle C. J., Pollock C. B., Williams and Keating JJ.*, and *Channell B.*, reversing the judgment of the Court of Queen's Bench,

- i. That the words "now in the port of *Amsterdam*" amounted to a warranty or condition precedent to the contract that the ship was there at the time of making the memorandum of charter-party.
- ii. That the question was properly raised by a plea that at the time of making the charter-party, time and the then situation of the ship were material and essential parts of the contract: although it should seem the question might also be raised by pleading the material circumstances on which the defendant relied as leading to the construction which the plea sought to put on the instrument.

THE defendant having brought error on the judgment in this case (see the report in the Court below, vol. I, p. 877), it was argued, on the 26th *November*, 1862, before *ERLE C. J., POLLOCK C. B., WILLIAMS and KEATING JJ.*, and *CHANNELL B.*

Honyman (*Bovill* with him), for the defendant, cited *Cockburn v. Alexander* (a); *Glaholm v. Hays* (b); *Ollive v. Booker* (c); *Oliver v. Fielden* (d); *Tarrabochia v. Hickie* (e); *Croockewit v. Fletcher* (f); *Hurst v. Usborne* (g); *Cranston v. Marshall* (h); *Bannerman v. White* (i); *Van Baggen v. Baines* (k).

Manisty (*MacLachlan* with him), contra, cited *Freeman v. Taylor* (l); *Seeger v. Duthie* (m); *Barker*, appellant, v. *Windle*, respondent (n); *Glaholm v. Hays* (b); *Elliot v. Von Glehn* (o); *Dimech v. Corlett* (p).

Honyman, in reply.

Cur. adv. vult.

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| (a) 6 C. B. 791. | (b) 2 M. & Gr. 257. |
| (c) 1 Exch. 416. | (d) 4 Exch. 135. |
| (e) 1 H. & N. 183. | (f) 1 H. & N. 893. |
| (g) 18 C. B. 144. | (h) 5 Exch. 395. |
| (i) 10 C. B. N. S. 844. 850. | (k) 9 Exch. 523. |
| (l) 8 Bing. 124. | (m) 8 C. B. N. S. 45. |
| (n) 6 E. & B. 675. | (o) 13 Q. B. 632. |
| (p) 12 Moo. P. C. C. 199. | |

The judgment of the Court was now delivered by

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WILLIAMS J. The question in this case is, whether the statement in the charterparty, that the ship is "now in the port of *Amsterdam*," is a "representation" or a "warranty," using the latter word as synonymous with "condition;" in which sense it has been for many years understood with respect to policies of insurance and charterparties. ✓

It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently the contract is not broken though the representation proves to be untrue; nor, (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. (See *Elliot v. Von Glehn* (a); *Wheelton v. Hardisty* (b).) ✓

If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority (see *Barker*, appellant, *Windle*, respondent (c),) that

(a) 13 Q. B. 632.

(b) 8 E. & B. 232; on appeal, 8 Id. 285.

(c) 6 E. & B. 675. 680.

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a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable.

Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court, and not the jury, must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition (see *Glaholm v. Hays* (a); *Oliver v. Fielden* (b); *Croockewit v. Fletcher* (c); *Seeger v. Duthie* (d)), while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement

(a) 2 M. & G. 257.

(c) 1 H. & N. 893.

(b) 4 Exch. 135.

(d) 8 C. B. N. S. 45.

(see *Tarrabochia v. Hickie* (a); *Dimech v. Corlett* (b); *Clipsham v. Vertue* (c).) But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages (see *Ellen v. Topp* (d), *Graves v. Legg* (e); adopting the observations of Serjt. *Williams* on the case of *Boone v. Eyre* (f), in 1 *Saund.* 320 d, 6th ed.; *Elliot v. Von Glehn* (g).) Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special

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(a) 1 *H. & N.* 183.(b) 12 *Moo. P. C. C.* 199.(c) 5 *Q. B.* 265.(d) 6 *Exch.* 424—441.(e) 9 *Exch.* 709—716.(f) 1 *H. Bl.* 273, note (a).(g) 13 *Q. B.* 632.

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stipulation to that effect in the contract; see *Bannerman v. White* (a)); but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or in other words, that the condition expressed in the contract has not been performed. Still if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.

In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply whether, in the true construction of the charter party, the Court ought to infer that the statement as to the ship's being at that date in the port of *Amsterdam* was meant to be a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the averment in the plea that time and the situation of the vessel were essential and material parts of the contract. On the trial of the issue joined thereon, it was no part of the Judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the

(a) 10 C. B. N. S. 844.

port, supposing it to be untrue, was an essential part of the contract, or a mere representation, and to direct the jury to find for the defendant or plaintiff accordingly. The question, it should seem, might also be raised by pleading the material circumstances (as was done in *Graves v. Legg* (a)), on which the defendant relies as leading to the construction which the plea seeks to put on the instrument. Unless one or other of these modes of pleading were adopted, the Court, in case there should be a demurrer to the plea, or on an application for judgment non obstante veredicto, would be precluded from taking the surrounding circumstances into consideration in aid of the construction.

It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which, the charter party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance, that a statement of it in the charter party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty; whereas, the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So if it were shewn that the charter party was made for a purpose such that, unless the vessel began her voyage from the port of loading with her cargo on board by a certain time, it was manifest that the object of the charter party would in all probability be frustrated, the Court might properly be led by this circumstance to conclude that a statement as to the locality of the ship, coupled with a stipulation

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(a) 9 *Exch.* 709.

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that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion which appears to have been, to some extent, sanctioned by high authority (see *Dimech v. Corlett* (a)), that a statement of this kind in a charter party, which may be regarded as a mere representation if the object of the charter party be still practicable, may be construed as a warranty if that object turns out to be frustrated; because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterwards occur. It is true that in some of the cases, where the question has been whether a stipulation in a charter party amounted to a condition, the Court decided that question in the negative, and in so doing took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it, and further suggested that, in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated the whole object which the charterer had in view (see *Freeman v. Taylor* (b); *Turra-bochia v. Hickie* (c); *Dimech v. Corlett* (d).) But the Court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition, if it were not originally intended to be one.

(a) 12 Moo. P. C. C. 199.

(b) 8 Bing. 124.

(c) 1 H. & N. 183.

(d) 12 Moo. P. C. C. 199. 224. 227.

The question on the present charterparty is confined to the statement of a definite fact—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to *England*, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so: the evidence for the defendant shews it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition and not performed, it follows that the obligation of the charterer dependant thereon, ceased at his option and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. So was the decision of *Glaholm v. Hays* (a), where the stipulation in a charter of a ship to load at *Trieste* was that she should sail from *England* on or before the 4th *February*, and the nonperformance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the nonperformance. So, in *Ollive v. Booker* (b),

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(a) 2 M. & G. 257.

(b) 1 Esch. 416.

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 BEHN load at *Marseilles* was that she was "now at sea, having
 v. sailed three weeks ago," and it was held to be a condition
 BURNES. for the reasons above stated. And we would note that
 the marginal abstract of this case states the stipulation
 to have been "having sailed three week ago or there-
 abouts." If the statement had really been so indefinite,
 it may be that the Court would have come to a different
 conclusion.

We think these cases well decided, and that they govern the present case. We think that the decision of *Dimech v. Corlett (a)* does not conflict with them; because it is immersed in the specific facts there set out, so as to be a precedent only for cases with very analogous specific facts. The statement in that charter, that the ship was "now at anchor in this port" (*Malta*), did not avail to release the charterer, because the ship was in the port in the dry dock; and, although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while in truth she was in a dry dock being built and was not completed for a month, yet, as the defendant was at *Malta*, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charterparty was broken, but allowed the ship to sail from *Malta* for *Alexandria* without objection, his defence on this point failed.

The Court below in a manner referred the present case to a Court of error to say whether the decision should be governed by *Ollive v. Booker (b)* or *Dimech v. Corlett (a)*. We are of opinion, for the reasons assigned, that the

(a) 12 Moo. P. C. C. 199.

(b) 1 Exch. 416.

decision of *Ollive v. Booker* was sound, and that it governs our decision here; and we are further of opinion that, in so holding, we do not at all conflict with the decision in *Dimech v. Corlett*, as above explained.

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On these grounds we think that the judgment of the Queen's Bench should be reversed.

Judgment reversed.

PEARSON *against* SPENCER.

1. There is a class of implied grants by devise where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.

2. Where the owner of a farm divided it by his will into two portions, devising them to *A.* and *B.* respectively, and the portion of *B.* was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of *A.*, and the deviser during his life had used a way in a certain direction over that property: held, affirming the decision of the Queen's Bench, that a right to use that way passed to *B.* by the devise.

Tuesday,
February 3d.

Easement.
Devise.
Way of necessity.

THIS was an appeal from the decision of the Court of Queen's Bench making absolute a rule to enter a verdict for the defendant on the ninth plea in the cause: (See the report in the Court below, vol. 1, p. 571): which was argued before ERLE C. J., POLLOCK C. B., WILLIAMS and KEATING JJ., and MARTIN, CHANNELL and WILDE BB.

Mellish, for the plaintiff.—The decision of the Court below, that this particular right of way passed to *Abraham Pearson* by the will of *James Pearson*, is erroneous and at variance with *Pheysey v. Vicary* (a), so that the only right of way to which *Abraham Pearson* was entitled

(a) 16 M. & W. 484.

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over this land was a way of necessity. Where property is divided by will between two persons, and one of the parts into which it is divided is land locked, so that the devisee must have a way of necessity over the other part, and the will is silent as to the direction of the way, it is for the devisee of the servient tenement to select it. A way of necessity should end with the necessity, and it would be unjust to impose on him a greater burden than is indispensable: wherefore it is enough if he gives the devisee of the dominant tenement a convenient way, even though it be not the *most* convenient way. [Martin B. How do you distinguish this case from *Pyer v. Carter* (a), in which it was held, that where the owner of two houses sells one of them, the house thus sold is entitled to the benefit and subject to the burden of all existing drains communicating with the other house?] That decision proceeded on the ground that the easement was continuous; and *Worthington v. Gimson* (b) shews that the doctrine there laid down does not extend to rights of way. [Channell B. In *Evert v. Cochrane* (c) it was held by the House of Lords, following what is said in *Gale on Easements*, 3d ed., p. 87, that the doctrine of *Pyer v. Carter* applies to any "drain or other easement necessary for the enjoyment of the property."] In *Dodd v. Burchell* (d) Martin B. says that *Pyer v. Carter* went to the utmost extent of the law. [Martin B. I thought that a strange decision; but it has recently been confirmed by the House of Lords. Wilde B. The question may depend on the nature of the way. A path through a man's field may not be used

(a) 1 H. & N. 916.

(b) 29 L. J. Q. B. 116; 6 Jur. N. S. 1053.

(c) 4 Macq. 117.

(d) 1 H. & C. 113, 121.

once in six months, but a gravelled path up to his house may be used forty times in a day. On the other hand, a drain may only be used occasionally (a).] In *Rol. Abr. Graunts*, 60, pl. 17: "Si jeo aie un close environ ove mon terre demesne de chescun parte, et jeo alien cest close al auter, il avera un chemin al cest close oustre mon terre come incident al graunt: car autrement il ne poet aver ascun benefit per le grant. *Mich. 3 Jac. B. R.*, per *Yelverton*; *Tr. 5 Jac. B. R.* enter *Clarke & Rugge*, et feoffor assignera le chemin lou il poet melius ceo spare." Pl. 18:—"Issint si le close alien ne soit totalment enclose ove mon terre, mes partment ove le terre de strangers: car il ne poet aler oustre le terre de le strangers. *Mich. 3 Jac. B. R.*, *quære*." It does not follow that the way which was most convenient while the premises were in one hand will be the most convenient when they are severed. [*Martin B.* In *Shep. Touchst.* 251, "If one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *I. S.*; in this case, if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case, I may choose which I will have and in these cases, when I have made my election,

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(a) In *Suffield v. Brown*, *Hil. Term*, 1864 (10 *Jurist N. S.* 111. 113, 3 *N. R.* 340. 344), in which *Ewart v. Cochrane* (4 *Macq.* 117) was cited, the Lord Chancellor said that he could not look on *Pyer v. Carter* (1 *H. & N.* 916) as rightly decided, and refused to accept it as an authority. It is important to observe that, *Ewart v. Cochrane* being the case of a *Scotch* appeal, it is not a *conclusive* authority on a question of *English* law, and the dictum of Lord Campbell C., p. 122, as to the identity of the *Scotch* and *English* laws on the subject must be looked on as extrajudicial.

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and not before, the grant is good." *Erle C. J.* If you warn a trespasser off your land, is he bound to go off by the shortest way?]

Quain, contra.—The decision of the Court below is good on two grounds.

First. The way in question passed to *Abraham Pearson* by the will of *James Pearson*, in construing which the Court should ascertain his intention, and for this purpose may look to the evidence supplied by the surrounding circumstances; *Packer v. Welsted* (a). It did not pass to *Abraham Pearson* as a way of necessity. Where the owner of two tenements conveys one of them, everything passes which is reasonably, though not perhaps absolutely, necessary for the enjoyment of the property; *Dutton v. Tayler* (b); *Proctor v. Hodgson* (c). The only legitimate way of necessity is the right of using a temporary passage when a highway is out of repair: other rights of way arise from express or implied grant. The law is thus laid down by *Serjt. Williams* in note (6) to *Pomfret v. Ricroft* (d), which is recognised and confirmed by the Court of Exchequer in *Pinnington v. Galland* (e):—"Where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it, he cannot derive any benefit from the grant. So it is where he grants the lands and reserves the close to himself." [He cited *Morris v. Edgington*, 3 *Taunt.* 24.]

(a) 2 *Sid.* 39, 111.(b) 2 *Lutw.* 1487.(c) 10 *Exch.* 824.(d) 1 *Wms. Saund.* 323, 6th ed.(e) 9 *Exch.* 1, 12.

Secondly. Where there is a way of necessity, and the direction is not pointed out, the selection is with the grantee, provided he selects one convenient to both parties, as the jury have found this to be. "In case election be given of two several things, always he who is the first agent, and who ought to do the first act shall have the election. As if a man grants a rent of 20s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent by payment of the one, or delivery of the other. So if a man makes a lease yielding rent, or a robe, the lessee shall have the election, *causa qua supra*. * * * But if I give you one of my horses in my stable, there you shall have election, for you shall be the first agent by taking or seizure of one of them. * * * And if one grant to another twenty loads of hasel, or twenty loads of maple, to be taken in his wood of *D.*, there the grantee shall have election, for he ought to do the first act, *scil.* to cut and take it; *Sir R. Heyward's Case* (a). In the edition of *Coke's Reports* by *Thomas* and *Fraser*, p. 526, note (c) to this case: "It is a general rule that when a deed is capable of enuring in different ways, the grantee has a right to elect in which way he will take it, and may choose that which is most for his own advantage; thus if a deed be made by the words *dedi et concessi*, this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the election of the grantee to plead or use it in the one way or the other." *Jacques v. Chambers* (b) is to the same effect. [He also referred to *Gale on Easements*, by *Willes*, p. 104, and *Hinchliffe*

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(a) 2 Co. 37 a.

(b) 2 Coll. 435.

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v. *The Earl of Kinnoul* (a). There is no ground for any distinction in this respect between wills and instruments inter vivos. According to the *Roman law*, *Dig. lib. 8, tit. 1, l. ix.* :—" Si cui simplicius *via* per fundum cujuspiam cedatur, vel relinquatur, in infinito (videlicet per quamlibet ejus partem) ire agere licebit : civiliter modo. Nam quædam in sermone tacite excipiuntur : non enim per villam ipsam, nec per medias vineas ire agere sinendus est : cum id æque commode per alteram partem facere possit, minore servientis fundi detrimento." [He also cited *Molitor, La possession, la revendication, la publicienne et les servitudes, en droit Romain, &c.*, p. 363-4.] *Rolle's Abridgment* is a posthumous publication, and the author does not cite any reported authority for the position laid down in *Grants*, 60, pl. 17, cited by the other side. The case referred to by him, as *Clarke v. Rugge*, is reported in *Cro. Jac.* 170, as *Clark v. Cogge*. [Williams J. It would rather seem that there the way had been already in existence.]

Mellish, in reply.—In *Packer v. Welsted* (b) it does not appear that the owner of the servient tenement was willing to give the owner of the dominant tenement any right of way at all. *Morris v. Edgington* (c) has been much doubted, but may be supported on the ground that there was a way of necessity. The cases on the doctrine of election do not apply, for they are all cases of express grant, and so are those cited from the *Roman law*.

ERLE C. J. We think that the judgment of the Court

(a) 2 *Bing. N. C.* 1 ; 6 *Scott*, 650.

(b) 2 *Sid.* 39. 111.

(c) 3 *Taunt.* 24.

below should be affirmed. We have been much struck with the argument of Mr. *Mellish*, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of *James Pearson's* will taken in connexion with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement (*a*). There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependance on the plaintiff's land of a right of way over it in the customary manner.

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(a) See the note to *Gale on Easements*, 3rd ed., by *Willes*, p. 105, § 1.

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The rest of the Court concurred.

Judgment affirmed

Monday,
February 2d.

CHAMBERLAIN v. THE WEST END OF LONDON
AND CRYSTAL PALACE RAILWAY COMPANY.

See the report of this case, ante, vol. 2, p. 617.

MEMORANDUM.

In this Vacation, *George Stovin Venables*, Esq.,
the *Inner Temple*, was appointed one of Her Majesty's
Counsel learned in the law.

END OF HILARY VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XXVI. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.	BLACKBURN J.
CROMPTON J.	MELLOR J.

CAMPBELL *against* SPOTTISWOODE.

*Saturday,
April 18th.*

1. When a writer in a newspaper or elsewhere, in commenting on public matters, makes imputations on the character of the individuals concerned in them, which are false and libellous, as being beyond the limits of fair comment, it is no defence that he bonâ fide believed in the truth of these imputations.

2. The plaintiff published in a newspaper, of which he was the editor and part proprietor, a proposal for inserting in it a series of letters on the duty of evangelizing the *Chinese*, and for promoting the circulation of the numbers of the paper in which those letters should appear in order to call attention to the importance of this work of evangelization. A series of letters accordingly appeared in the newspaper, and in the same numbers lists of subscribers for copies of the paper for distribution. In an action of libel against the defendant, the publisher of another newspaper, for an article commenting on the plaintiff's scheme, imputing that his real object was to promote the sale of his paper, and suggesting that the names of some of the subscribers in the lists were fictitious, the jury found for the plaintiff, with the addition that the writer of the article believed the imputations in it to be well founded: Held, that this belief of the defendant was no answer to the action.

*Libel.
Newspaper.
Privilege.
Bona fides.*

LIBEL. The declaration stated that the plaintiff was
a Protestant dissenting minister, and minister of a

1863. . congregation of Protestant dissenters, and the editor
 CAMPBELL a newspaper called *The British Ensign*, and had pu
 v. lished the names or descriptions of divers persons
 SPOTTIS- subscribers for and persons purchasing and promising
 WOODE. purchase copies of that newspaper; and the defend
 a falsely and maliciously printed and published of t
 plaintiff, to wit, in a periodical publication called *The*
Saturday Review of Politics, Science, Literature an
Art, a false, scandalous, malicious and defamatory libe
 and in one part of which libel was contained the fals
 scandalous, malicious, defamatory and libellous matt
 following of and concerning the plaintiff, that is t
 say:—"The doctor" (meaning the plaintiff) "refe
 frequently to Mr. *Thompson* as his authority—so fr
 quently, that we must own to having had a transito
 suspicion that Mr. *T.* was nothing more than anothe
 Mrs. *Harris*, and to believe, with Mrs. *Camp*'s acquaint
 ance, that there 'never was no such person.' But
 Mr. *Thompson*'s name is down for 5000 copies of *The*
Ensign, we must accept his identity as fully proved, an
 we hope the publisher of *The Ensign* is equally satisfie
 on the point." And in another part of which said lib
 was also contained the false &c. matter following of ar
 concerning the plaintiff, that is to say:—"To spre
 the knowledge of the gospel in *China* would be a go
 and an excellent thing, and worthy of all praise an
 encouragement; but to make such a work a mere pr
 text for puffing an obscure newspaper into circulation
 a most scandalous and flagitious act; and it is this a
 we fear, we must charge against Dr. *Campbell*." Ar
 in another part of which said libel was also contained t
 false &c. matter following of and concerning the plainti
 that is to say:—"There have been many dodges tried
 make a losing paper 'go,' but it remained for a lead

in the Nonconformist body to represent the weekly subscription as an act of religious duty. Moreover, the well known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking. ‘*R. G.*’ takes 240 copies, ‘*A London Minister*’ 120, ‘*An Old Soldier*’ 100, and so on. Few readers, we imagine, will have any doubt in their minds as to who is the ‘*Old Soldier*,’ meaning thereby that the plaintiff had falsely and deceitfully published, as the names or descriptions of subscribers for or purchasers of the said newspaper, divers fictitious names or descriptions which did not in fact represent any persons really being subscribers for or purchasers of the said newspaper. And in another part of which said libel is also contained the false &c. matter following of and concerning the plaintiff, that is to say:—“For, whatever may be the private views of the editor of *The Ensign*” (meaning the plaintiff), “there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. It must take the sting out of many a sorrow, and smooth away many a trouble. The past cannot be very sad, nor the future very dreadful, to him who has the capacity for hoping all things and believing all things without hesitation. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor” (meaning the plaintiff) “more than an equivalent is provided in its freedom from doubts and suspicions, and the sense of security that it confers.” And in another part of which libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—“No doubt it is deplorable to find an

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1863. ignorant credulity manifested among a class of the community entitled on many grounds to respect; but now and then this very credulity may be turned to good account. Dr. *Campbell*" (meaning the plaintiff) "is just now making use of it for a very practical purpose, and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. *Campbell*" (meaning the plaintiff) "has finished his *Chinese* letters, he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be no doubt that he is making a very good thing indeed of the spiritual wants of the *Chinese*." And the plaintiff, by reason of the premises, has been greatly injured, scandalized and aggrieved. And the plaintiff claims 1000*l*.

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Plea. Not guilty.

On the trial, before *Cockburn* C. J., at the Sittings at *Guildhall* after *Hilary* Term, it appeared that the defendant was the printer of a weekly newspaper or periodical called *The Saturday Review of Politics, Literature, Science and Art*, and that the libels complained of were published in an article headed "The Heathens' Best Friend," contained in the number for *June* 14th, 1862.

The plaintiff was a minister of a dissenting congregation, and the editor and part proprietor of *The British Ensign* and *The British Standard*, which were dissenting newspapers or periodicals. Extracts from the former were put in evidence, containing a proposal to publish in it a series of letters to the Queen and persons of note on the subject and duty of evangelizing the *Chinese*, and to promote

as widely as possible the circulation of the numbers of the paper in which those letters should appear, in order to call the attention of missionaries and others to the importance of this work of evangelization. A series of letters accordingly appeared in *The British Ensign*, the three first of which, headed "Christian Missions," were addressed to the Queen, and the rest headed "*China—Conversion of the Chinese,*" were addressed to the Archbishop of *Canterbury*, the Earl of *Shaftesbury*, Viscount *Palmerston*, *Thomas Thompson, Esq., of Prior Park, Bath*, and other persons; and from time to time in the same numbers with the letters were published lists of subscribers for copies of the paper for distribution. In one of these lists were the following, "The Hon. Mrs. *Thompson*, 5000 copies; An Old Soldier, 100; *R. G.*, 240; *M. S. D.*, 10; *J. S.*, 240; *A. J.*, 30."

The whole of the article in which the passages set forth in the declaration appeared was read to the jury.

It was contended, on the part of the plaintiff, that the passages set forth in the declaration imputed to him the charge of fabricating fictitious subscription lists, and of trying to procure subscriptions professedly for the conversion of the heathen, but in reality for the purpose of putting money into his own pocket. The plaintiff himself and some of the subscribers, among whom was *Mr. Thompson*, were called as witnesses, to shew that such charges were without foundation, and to prove the reality of the subscriptions.

For the defendant it was contended that the article was such a comment as a public writer was entitled to make upon the scheme publicly put forward by the plaintiff; and that that scheme was such that the writer of the article was privileged in imputing improper

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motives to the plaintiff, provided he fairly and honestly believed such imputations to be well founded.]

The Lord Chief Justice directed the jury that if they thought the effect of the article complained of was fairly to criticise and comment upon, though in a hostile spirit, the scheme publicly put forward by the plaintiff, they should find for the defendant. But if they thought that the article went beyond that, and imputed to the plaintiff base and sordid motives which the evidence had shewn to be without foundation, and that he asked for public subscriptions, not for the purpose of promoting the progress of Christianity in *China*, but for the purpose of private pecuniary gain, they should find a verdict for the plaintiff. Further that, in his opinion, it was no defence that the writer honestly believed the imputations made to be well founded. At the same time he asked them, at the suggestion of the defendant's counsel, if they returned a verdict for the plaintiff, and were of opinion that the writer of the article made the imputations under a genuine and honest belief that they were well founded, or the plaintiff was fairly open to them, they should find the fact specially.

The jury found a verdict for the plaintiff, damages 50*l.*, and also found that the writer of the article in *The Saturday Review* believed the imputations in it to be well founded.

The Lord Chief Justice thereupon directed the verdict to be entered for the plaintiff, and reserved leave to move to enter the verdict for the defendant.

Bovill moved accordingly, or for a new trial on the ground of misdirection.—He argued that a matter not only of public but universal interest, which was the subject of fair comment and criticism, was brought before

the public by the plaintiff in his newspaper; that the editor or publisher of a newspaper or other periodical was privileged in making such comment or criticism and therefore the ordinary presumption of malice was rebutted; and that, in commenting upon public matters and the conduct of public men, there was permitted for the interests of society an unlimited right of discussion as to motives, if there were no attack on private character, provided the person making such comments honestly and bonâ fide believed them to be well founded. He cited *Paris v. Levy* (a), per Erle C. J.; *S. C.*, in banc, per Byles J. (b); *Stark. on Slander and Libel*, 2d ed., *Prely. Disc.*, p. cxxx., vol. 1, p. 304-305; *Eastwood v. Holmes* (c), per Willes J.; *Turnbull v. Bird* (d), per Erle C. J.; *Beatson v. Shene* (e); *Maitland v. Bramwell* (f); *Carr v. Hood*, note to *Tabart v. Tipper* (g), per Lord Ellenborough; and *Padmore v. Lawrence* (h). He also contended that the Lord Chief Justice ought to have left to the jury the question whether the imputations contained in the libel were in excess of fair comment or not.

COCKBURN C. J. I am of opinion that there ought to be no rule. The article on which this action is brought is undoubtedly libellous. It imputes to the plaintiff that, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper. The article also charges that,

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(a) 2 F. & F. 71, 75, 76.

(c) 1 F. & F. 347, 350.

(e) 5 H. & N. 838.

(g) 1 Camp. 354, 357.

(b) 9 C. B. N. S. 342, 363.

(d) 2 F. & F. 508, 523, 526.

(f) 2 F. & F. 623.

(h) 11 A. & E. 380.

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in furtherance of that base and sordid purpose, he published in his newspaper the name of a fictitious person as the authority for his statements, and still further that, with a view to induce persons to contribute towards his professed cause, he published a fictitious subscription list. These are serious imputations upon the plaintiff's moral as well as public character.

It is said, on behalf of the defendant that, as the plaintiff addressed himself to the public in a matter, not only of public, but of universal interest, his conduct in that matter was open to public criticism, and I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated ; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. *Bovill* is obliged to say that, because the writer of this article had a bonâ fide belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to

have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty: and that is going farther than the law allows.

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest.

The cases cited do not warrant us in going that length. In *Paris v. Levy* (a) there may have been an honest and well founded belief that the man who published the handbill which was commented upon could only have had a bad motive in publishing it, and if the jury were

(a) 2 F. & F. 71.

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of that opinion, the writer who attacked him in the public press would be protected. We cannot go farther than that.

CROMPTON J. I am of the same opinion: for the reasons given by the Lord Chief Justice. It must be taken that the jury have found that the imputations made were not within the range of fair argument or criticism on the plaintiff's publication of his scheme. Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in Courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bonâ fide belief that he is publishing what is true, that is any answer to an action for libel. With respect to the publication of the plaintiff's scheme, the defendant might ridicule it and point out the improbability of its success; but that was all he had a right to do.

The first question is, whether the article on which this action is brought is a libel or no libel,—not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and bonâ fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged

communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word "privilege" is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not there was no privilege.

In the present case it is clear, as found by the jury, that the article is beyond the range of fair comment, and, this not being a case within the rule as to privilege, the only other available mode of defence was by proving the truth of the article.

The verdict was therefore right; and the finding of the jury, that the writer of the article believed what he wrote to be true, affords no answer to the action; and I

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think the case is so clear that we ought not to throw any doubt upon the subject by granting a rule.

BLACKBURN J. I also think that the law governing this case is so clearly settled that we ought not to grant a rule. It is important to bear in mind that the question is, not whether the publication is privileged, but whether it is a libel. The word "privilege" is often used loosely, and in a popular sense, when applied to matters which are not, properly speaking, privileged. But, for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a privileged relation: and the cases of a memorial to the Lord Chancellor or the Home Secretary on the conduct of a justice of the peace, *Harrison v. Bush* (a), and of a statement to a public functionary, reflecting upon some public officer, *Beatson v. Skene* (b), rank themselves under that class. In *Maitland v. Bramwell* (c) the bona fides of the defendant was left to the jury, because she was privileged by her position to say what she believed to be true; so in *Eastwood v. Holmes* (c), when properly understood, *Willes* J. must have considered that there was a privilege of this kind when he nonsuited the plaintiff in an action against the publisher of a report of the proceedings of *The British Archæological Association*, in which it was stated that some supposed antiquities offered for sale by the plaintiff were of recent fabrication. In these cases no action lies unless there is proof of express malice. If it could be shewn that the editor or pub-

(a) 5 E. & B. 344.

(b) 5 H. & N. 838.

(c) 2 F. & F. 623.

(d) 1 F. & F. 347.

lisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement; *Paris v. Levy* (a). In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel.

The question of libel or no libel, at least since *Fox's Act* (32 G. 3. c. 60.), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another,—whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr. *Bovill* asked that a further question should be left to them, viz. whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. Bonâ fide belief in the truth of what is written is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous.

(a) 2 F. & F. 71.

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In *Turnbull v. Bird* (a) it was assumed that a person who entertained the belief that a Roman Catholic would falsify a document for the good of his church, might bring forward that belief in commenting upon the question whether a Roman Catholic should hold a particular office; and in that case the question of the bonâ fide belief of the defendant might be a proper ingredient to be considered in determining whether the alleged libel was in excess of fair and proper comment or not. But Chief Justice *Erle* does not say that the alleged libel was a privileged communication in the strict sense of the word, requiring proof of actual malice: neither does he say that honest belief, taken by itself, would have the effect of making it not an unfair comment or not a libel. In *Paris v. Levy* (b) if the jury thought that the handbill commented on offered an inducement to servants to commit petty thefts, as was alleged in the article complained of, that also might be an ingredient in considering whether the article was a fair comment.

MELLOR J. I am of the same opinion. I should be unwilling to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But giving full latitude to fair comment, so soon as a writer imputes that the person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism.

If comment is beyond the limits of fair criticism it becomes a libel. And I agree that the question in this

(a) 2 F. & F. 508.

(b) 2 F. & F. 71.

case is, libel or no libel. If the words were used upon a justifiable occasion, no action could be maintained; for the interest and exigencies of society require that there should be free communication between parties who have a duty, either moral or legal, to discharge towards each other, as in the common case of a master giving the character of a servant, in which defamatory words are privileged unless proved to be false and malicious. But in the present case there was no legal or moral duty on the writer to make these imputations upon the plaintiff. The jury found that the comments were beyond the limits of fair criticism; I think they were; and it would be very hard if an action could not be maintained. Suppose an action brought against a person for a libel, containing a serious imputation on the plaintiff's character; and the jury think that the party making it honestly believed it to be true. If the doctrine contended for by Mr. *Bovill* prevailed, what would be the effect upon the character of the plaintiff? He could not clear himself; and it would be said that, although the jury had not found that the imputation was true, they found that the person who made it fairly and honestly believed it to be well founded. That would be a serious hardship on the person libelled. And, as far as I am aware, this is the first time it has been contended that a libel which imputes the obtaining of money under false pretences, and is not excused by being true, nor made on an occasion in which the exigencies of society required it, is excused by the fact that the person making it believed it to be true.

I therefore concur in thinking that no doubt should be left on the point by granting a rule.

Rule refused.

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*Wednesday,
April 29th.*

SHERBORN the younger, appellant, **WELLS**,
respondent.

*Metropolitan
Police Act,
2 & 3 Vict.
c. 47. s. 54.
Cattle "loose"
in a thorough-
fare.*

The owner of land on both sides of a highway, who claimed the grass and herbage growing on such parts of it as were not gravelled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it: Held, that they were not turned loose within the meaning of The Metropolitan Police Act, 2 & 3 Vict. c. 47. s. 54, clause 2.

CASE stated by justices under the 20 & 21 Vict.
c. 43.

The appellant was convicted, under The Metropolitan Police Act, 2 & 3 Vict. c. 47. s. 2., on the information of police serjeant *Wells*, at the Petty Sessions Police Court at *Sunbury*, in the county of *Middlesex*, in the penalty of ten shillings and costs, for having, on the 23d June, 1862, turned loose a quantity of cattle, to wit, &c., in a public thoroughfare in the parish of *Bedfont*, in the said county, being within the Metropolitan Police District.

The police serjeant gave evidence that, on the 23d June, 1862, his attention was called by Mr. *Robert Taylor*, of *Bedfont*, to a number of cattle that were loose in the *Stanwell Road*, in that parish: that he went there and saw eleven head of cow cattle belonging to the appellant; they were loose: that he had previously seen the appellant about the cattle being loose, and cautioned him, and the appellant said he had a right to turn out there: some of the cattle were grazing and some were lying down.

The appellant's servant had the care of and was near to the cattle grazing on the sides of the highway; and

the appellant was the owner of the land on both sides of the road, and claimed the grass and herbage growing on such parts of the road as were not gravelled.

The question for the opinion of the Court was, Whether the justices were right in convicting the appellant, the cattle being loose and in the care of a servant who had no hold of them, either by halter or otherwise, notwithstanding the appellant's claim to the grass and herbage?

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No counsel appeared for the respondent.

C. E. Pollock, for the appellant.—Stat. 2 & 3 Vict. c. 47. s. 54. enacts: "That every person shall be liable to a penalty not more than 40s., who, within the limits of the Metropolitan Police District, shall, in any thoroughfare or public place, commit any of the following offences, (that is to say,)

"1. Every person who shall, to the annoyance of the inhabitants or passengers, expose for show or sale (except in a market lawfully appointed for that purpose), or feed or fodder any horse or other animal," &c.

"2. Every person who shall turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge any dog or other animal to attack, worry, or put in fear any person, horse, or other animal.

"3. Every person who by negligence or ill usage in driving cattle shall cause any mischief to be done by such cattle, or who shall in anywise misbehave himself in the driving, care, or management of such cattle, and also every person not being hired or employed to drive such cattle who shall wantonly and unlawfully pelt, drive, or hunt, any such cattle."

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The justices construed the word "loose" in clause 2 as meaning "physically loose;" but, looking to the context, the enactment only requires that the owner or his servant should have the care and control of the cattle. Clause 1 enumerates acts done to the annoyance of passengers: clause 2 extends to acts done whether to the annoyance of passengers or not. In clause 3, which relates to the driving of cattle, it cannot have been intended that all cattle should be led by a halter. The Highway Act, 5 & 6 W. 4. c. 50. s. 74., which is in *pari materia*, only empowers the surveyor to impound "cattle found wandering, straying, or lying, or being depastured, on any highway or on the sides thereof, without a keeper."

COCKBURN C. J. I am of opinion that the construction contended for by the appellant is right, and that the Act only makes it an offence to turn cattle loose, so as to be free from all control and at liberty to go where they will, and so endanger passengers on a highway; and that it does not apply where cattle are turned out under the care of a servant to keep them from wandering on the highway.

CROMPTON J. concurred.

BLACKBURN J. The Act does not make it necessary that the control over the cattle on the highway should be by means of a halter.

MELLOR J. concurred.

Conviction quashed.

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EVANS appellant, BOTTERILL and others, respondents.

*Wednesday,
April 29th.*

*Poaching.
25 & 26 Vict.
c. 114. s. 2.
Circumstantial
evidence.*

1. Under stat. 25 & 26 *Vict. c. 114. s. 2.*, a person may be convicted of having obtained game by unlawfully going on land in search or pursuit of game without evidence of his having been on any particular land.

2. A person may be convicted of that offence, or of having used any net, &c., for unlawfully killing or taking game, upon circumstantial evidence.

CASE stated pursuant to stat. 20 & 21 *Vict. c. 43.*

At a Petty Sessions holden at *Northampton* for the division of *Northampton*, in the county of *Northampton*, the respondents were charged by the information and complaint of the appellant, one of the inspectors of the county police, for that they, on the 26th *October*, 1862, at &c., were searched by the appellant, one of the constables for the county, in a certain highway there, called *Cotton End*, he having good cause to suspect the respondents of coming from certain land where they had been unlawfully in search and pursuit of game, and having in their possession game unlawfully obtained, and nets used for unlawfully taking game, and there being then found upon them certain game, to wit, &c., and also seven nets used as aforesaid, which he the said constable then lawfully seized and detained, and prayed that the respondents might be summoned to answer the said information and complaint.

The appellant gave evidence that, in consequence of information received by him that several persons had left *Northampton*, having nets in their possession, he, with five other constables for the county, went to a place called *Cotton End*, expecting that the parties would

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return to *Northampton* that way; that about 6 o'clock on *Sunday* morning the 26th *October* he saw nine men, among whom were the respondents, coming along the public highway called *Cotton End*, carrying bags; that he, with the assistance of the other constables, stopped and searched them, and found in the bags one hare and fifteen rabbits, and also seven nets and several stakes used for the purpose of fastening down the nets in their possession, and that he seized and detained the game, nets and stakes. No evidence was given either of the parties having entered or been upon any land in search or pursuit of game, or of their having used any net thereon.

It was contended by the appellant that the mere finding of game and nets in the possession of the respondents was sufficient to convict them of having game unlawfully in their possession, and of having used the nets unlawfully, under stat. 25 & 26 *Vict. c. 114. s. 2.*

The justices being of opinion that some evidence should be given of the respondents having either obtained the game by unlawfully going on land in search or pursuit of game, or of their having used the nets for unlawfully taking game, or being accessory thereto, dismissed the complaint.

No counsel appeared for the respondents.

Markham, for the appellant.—By stat. 25 & 26 *Vict. c. 114. s. 2.*, “It shall be lawful for any constable or peace officer in any county, borough, or place in *Great Britain* and *Ireland*, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having

in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart or other conveyance, to seize and detain such game, article or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in Petty Sessions as provided in" stat. 18 & 19 *Vict. c. 126. s. 9.* ; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds," &c. In *Brown*, appt., *Turner*, respt. (a), it was held sufficient if there was circumstantial evidence warranting the inference that the persons charged had obtained the game by unlawfully going on land in search or pursuit of game. [*Mellor J.* There the justices, by convicting the appellants, found the fact that they had been on *some* land: here the justices decline finding that fact.] The words "any land," in sect. 2, do not mean "any particular land." In the case cited *Erle C. J.* says, p. 494, "It was not necessary to prove from whose land the rabbits were taken. The only question was, whether they had been unlawfully taken from any land."

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(a) 13 *C..B. N. S.* 485.

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COCKBURN C. J. There are two heads of offence in sect. 2, under either of which a person who has been stopped by a constable, and in whose possession any game, or any article or thing for the destruction of game has been found, may be convicted: viz. the having obtained game "by unlawfully going on any land in search or pursuit of game," and the having used the article or thing "for unlawfully killing or taking game." In the present case the justices might convict under the second head, which is free from the difficulty of producing evidence that the parties have been on any particular land, and is therefore independent of the question decided in *Brown*, appt., *Turner*, respt. (a); for here was evidence from which the justices might infer that the respondents had used the poaching instruments found upon them for unlawfully killing the game which was also found upon them. But upon the authority of *Brown*, appt., *Turner*, respt. (a), from which I see no reason to dissent, the justices might also convict under the first head, for game is not usually found upon a highway.

CROMPTON J. I am of the same opinion. The circumstances in the present case were an excuse to the constable for having arrested and searched the respondents, and when they appeared on a summons before the justices there was evidence on which they might have convicted them under either head of offence in stat. 25 & 26 Vict. c. 114. s. 2. In *Brown*, appt., *Turner*, respt. (a), the Court of Common Pleas held that it was sufficient if there was circumstantial evidence from which the justices might infer that the person charged had been on some land in search or pursuit of game; and I think that

(a) 13 C. B. N. S. 485.

that is the right construction of the Act, because, where constables stop persons in the dead of the night, under such circumstances as these, it may be impossible to predicate that they have been on any particular land; and, in creating the second head of offence, sect. 2 does not mention that the nets or other instruments should have been used on land at all.

If this be the right construction of the section, there was evidence on which the justices might have found that the respondents had been unlawfully on land in pursuit of game, and that they had been using nets for unlawfully taking game, because, as the Lord Chief Justice said, it is reasonable to infer that the game was the produce of the use of the nets. And it is important to decide both points, because there may be cases in which persons are stopped having game in their possession without nets, and cases also of their having nets without game. But the justices were not bound to act upon the evidence, and therefore the case ought to go back to them to inquire whether they are satisfied upon it that the respondents were guilty of one or other of these offences.

BLACKBURN J. I am of the same opinion. It is sufficient if there was evidence leading to the conclusion that the persons charged had been on any land in search or pursuit of game, or that they had used a net or other instrument for killing or taking any game. But I wish to draw attention to this, that the language of sect. 2, creating the offence, is "if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game," and the justices ought not to convict

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1863. unless they are satisfied that the parties charged have
 EVANS been on land, or have used nets or other instruments
 V. for those purposes. The evidence in the present case is
 BOTTERILL. sufficient, though not conclusive, to justify a conviction
 for obtaining game by unlawfully going on land, and
 also for using nets for unlawfully taking game. The
 force of the evidence may depend very much upon the
 place and hour where persons are met. But there is no
 presumption of law or fact, merely because persons are
 possessed of game or nets at a suspicious time and place,
 that they have been guilty of either of the offences.

MELLOR J. In the Vacation I ordered the justices to
 state a case for the opinion of this Court, and my first
 impression was that the conviction must allege that the
 party had obtained the game by unlawfully going on some
 particular land. But, upon looking at the statute more
 closely, I agree in the opinion of the rest of the Court.
 The early part of sect. 2 enables a constable, on reason-
 able grounds of suspicion, to search persons "coming from
 any land" where they have been unlawfully in search or
 pursuit of game: there the expression "any land" is
 used generally, and it must be so read in the latter part
 of the section.

I also agree with my brother *Blackburn* that, in the
 present case, though there is strong evidence from which
 the justices might infer that either offence had been
 committed, they are not bound to do so.

Markham stated that the appellant was content with
 the expression of the opinion of the Court, and did not
 wish the case to be sent back (a).

(a) See *Reg. v. Jarrold*, on stat. 24 & 25 Vict. c. 96. s. 58., 1 *Leigh & Cave*, 301. 304. 306, per *Crompton J.* and *Pollock C. B.*

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The Overseers of PRESTON, appellants, The
Overseers of BLACKBURN, respondents.

Wednesday,
April 29th.

Pauper.
Residence in
union.
Irremovability.
24 & 25 Vict.
c. 55. s. 1.

Stat. 24 & 25 Vict. c. 55., passed on 1st August, 1861, by sect. 1 enacts, that "after the 25th day of March next the period of three years shall be substituted for that of five years specified in the 1st section of" stat. 9 & 10 Vict. c. 66., "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish: Held, that a pauper, who, on the 14th March, 1862, when an order of removal was made, had resided three years in a union, of which eighteen months next before the application for the order were in the township of B., and more than three years prior to those eighteen months were in the township of L., could not be removed under it after the Act passed.

SPECIAL case stated by consent under stat. 12 & 13
Vict. c. 45. s. 11.

An order for the removal of *Edward Moulden* and his wife *Annice*, and their child *Sarah*, from the township of *Blackburn* to the township of *Preston*, both in the county of *Lancaster*, was made on the 14th March, 1862. On the 21st of April grounds of removal and notice of chargeability were duly sent by the overseers of *Blackburn* to the overseers of *Preston*. On the 13th of May the overseers of *Blackburn* received due notice of appeal against the order.

The place of the last legal settlement of *Edward Moulden* and his wife and child, at the time when the order of removal was made, was in the appellant township, as was duly stated in the examination, and in the grounds of removal upon which the order was made. The pauper had resided in the township of *Blackburn* continuously for eighteen months next before the application for the order of removal. For more than three years prior and up to the commencement of those eighteen

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months, he had resided continuously in the township of *Livesey*, in the same county. The township of *Livesey*, and the township of *Blackburn* were, during all the times aforesaid, comprised and included within the *Blackburn* Poor Law Union in that county, so that the pauper had resided continuously within the *Blackburn* Poor Law Union for more than three years next before the application for the order of removal.

The appellants contended that stat. 24 & 25 *Vict. c. 55.* has a retrospective effect, and that the continuous residence of the pauper in the *Blackburn* Union for three years and upwards next before the application for the order, though he had not resided three years in the township of *Blackburn*, which is comprised in the *Blackburn* Union, did, at the time of making the order, prevent his removal to the place of his last legal settlement, namely the township of *Preston*.

The respondents contended that the Act is to be construed only prospectively as regards a union residence, and in that respect does not take effect until the expiration of three years from the time when it came into operation, and that, at the time of making the order, it did not prevent the removal of the pauper to the township of *Preston*.

If the Court should be of opinion that the pauper was at the time of making the order removable, the order was to be confirmed; but if otherwise, the order was to be quashed.

Maule, for the respondents.—Stat. 24 & 25 *Vict. c. 55. s. 1.*, which received the Royal assent on the 1st of *August*, 1861, enacts “that after the 25th day of *March* next the period of three years shall be substituted for

that of five years specified in the first section of the statute" 9 & 10 *Vict. c. 66.* : that clause, if it stood alone, would be retrospective and apply to cases in which residence commenced before the passing of the Act : but the section proceeds, "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." The latter clause creates a new mode of acquiring irremovability, and the residence must commence after the 25th of *March*, 1862 : that clause therefore is not retrospective. [*Crompton J.* Can one clause of the section be retrospective and the other not?] Stat. 9 & 10 *Vict. c. 66. s. 1.*, which enacts "that from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant," is retrospective in its terms ; *Reg. v. The Inhabitants of Glossop (a)*, *Reg. v. The Inhabitants of St. Pancras (b)* ; and if the Legislature had intended the present clause to be retrospective, it would have been so expressed. They have not, as in the first clause, said that residence in a union shall be "substituted" for residence in a parish. [*Crompton J.* They have not used that term for the sake of avoiding the inelegance of repetition, but they must have meant substitution.]

By stat. 11 & 12 *Vict. c. 110. s. 3.* the costs of a pauper who, not being settled in the parish where he resides, is irremovable by virtue of stat. 9 & 10 *Vict. c. 66. s. 1.*, are to be charged to the common fund of the union. Under stat. 24 & 25 *Vict. c. 55. s. 1.* residence for three years in a union confers irremovability. But no person can have a settlement in a *union* ; and there-

(a) 12 *Q. B.* 117.

(b) *Id.* 129.

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fore residence in the union would not render the common fund of the union liable. In the present case no residence for three years has been had in the township of *Blackburn*, but only in the union containing that township, and thus the union fund will not come in aid of the township, where the pauper has become chargeable and irremovable only, and has not resided for three years. This defect, which throws the cost of relief on the parish or township, suggests the intention of the Legislature to postpone the commencement of the three years of union residence until after the 25th *March*, 1862, that this anomaly may be rectified.

Patchett, for the appellants, was not called upon.

COCKBURN C. J. The first part of stat. 24 & 25 *Vict. c. 55. s. 1.*, by which the Legislature substituted three years for five years in stat. 9 & 10 *Vict. c. 66. s. 1.*, under which irremovability is acquired by residence, is retrospective. In the same section the Legislature has enlarged the area within which residence confers irremovability; and I cannot conceive any reason why, as soon as residence in any part of a union has the same effect as residence in a parish, the time of its taking effect should be postponed because the time of the enactment coming into operation is postponed; or why the latter part of the section should not be retrospective as well as the former. The pauper therefore could not be removed, and the order must be quashed.

CROMPTON, BLACKBURN and MELLOR JJ. concurred.

Order of removal quashed (*a*).

(*a*) See *The Overseers of Salford*, appts., *The Overseers of Manchester*, respts., *anté*, p. 599.

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The Overseers of SCRIVEN WITH TENTERGATE,
appellants, FAWCETT, respondent.

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The parish of *K.* comprises several townships, of which *S.* is one. The vicarial tithes of *K.* were commuted at 86*l.* 13*s.* 4*d.*, the amount of which apportioned to *S.* was 60*l.* 1*s.* 4*d.* The vicarage was also endowed with glebe in the parish of *K.*, but not in the vicar's pastoral charge, and with the proceeds of the sale of glebe invested in the funds, together amounting to 300*l.* : Held, that in assessing the tithe commutation rent charge in *S.* to the poor rate, under stat. 6 & 7 *W.* 4. c. 96., the salary of a curate necessarily employed by the vicar of *K.* for the proper discharge of the ecclesiastical duties of the parish should not be deducted from the tithe rent charge alone, but should be charged upon the aggregate of all the annui proventus of the vicarage.

Poor Rate.
6 & 7 *W.* 4.
c. 96.
Tithe commu-
tation rent
charge.
Curate's
salary.
Apportion-
ment.

SPECIAL case stated by consent, under stat. 12 & 13
Vict. c. 45. s. 11.

At a Special Sessions for hearing appeals against poor rates holden in and for the wapentake of *Claro*, in the West Riding of *Yorkshire*, on the 23d *October*, 1861, the Rev. *James Fawcett*, clerk, the vicar of the parish of *Knaresborough*, appealed against a rate made for the relief of the poor of the township of *Scriven with Tentergate*, in that riding and parish, by the overseers of the poor of the township, on the 17th *September*, 1861. The parish of *Knaresborough* comprises several separate townships, of which *Scriven with Tentergate* is one.

In the poor rate for the township of *Scriven with Tentergate* the respondent was thus assessed :—

	Gross estimated rental.	Rateable value.	Rate at 1 <i>s.</i> in the £
Small tithes and glebe land.	£60 0 0	£35 0 0	£1 15 0

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There was no glebe land in the township to be rated.

On the part of the respondent it was alleged that this assessment was excessive on the ground that the salary which he paid to his stipendiary curate, viz. 100*l.* a year, exceeded the amount derived by him from his commutation rent charge, and it was proved that the amount for which the vicarial tithes payable to the respondent, as vicar of *Knaresborough*, were commuted was 86*l.* 13*s.* 4*d.*, and that the net annual value thereof was 70*l.* The amount of the foregoing commutation rent charge is apportioned among five of the townships comprised in the parish of *Knaresborough* as follows :—

Amount of commutation rent charge in	£	s.	d.
<i>Scriven with Tentergate</i> - - -	60	1	4
„ in <i>Knaresborough</i> - - -	20	0	0
„ in <i>Bilton</i> - - - - -	0	13	4
„ in <i>Ferrensbey</i> - - - -	5	18	8
„ in <i>Brearton</i> 6 <i>s.</i> 8 <i>d.</i> , but not collected	0	0	0
Making a total of - - -	86	13	4

The vicarage is also endowed with glebe
 as follows :—

Stonefall Farm, situate in the township
 of *Bilton with Harrogate*, in the parish
 of *Knaresborough* in a separate ecclesi-
 astical district, and not in the pastoral
 charge of the vicar, producing an annual £
 rent of - - - - - 180

Arkendale Farm, in the parish, but not
 in the vicar's pastoral charge, producing
 an annual rent of - - - - - 36

Proceeds of the sale of glebe now invested

by the Ecclesiastical Commissioners in the funds, and producing an annual in- come of - - - - £84	1863. <hr/> Overseers of SCRIVEN WITH TENTERGATE V. FAWCETT.
	300 0 0
Total income of the vicarage - - £386 13 4	<hr/>

Less the difference of 16*l.* 13*s.* 4*d.* between the amount of the commuted tithe rent charge and the net annual receipts, the difference being occasioned by expenses of collection and occasional losses. The amount of the rental of the glebe lands is clear of all tenants' rates and assessments.

The farms, *Stonefall* and *Arkendale*, are not in the pastoral charge of the vicar, but located in a separate ecclesiastical district formed out of the parish of *Knaresborough*. These farms are assessed to the poor and other rates of the respective townships of *Bilton with Harrogate* and *Arkendale*. There is a chapel of ease in *Knaresborough*, which was erected in 1856, without any endowment, and there is also a chapel of ease at *Brearton*, four miles from the parish church of *Knaresborough*. There are three full services at the parish church on every *Sunday*, one on *Friday* morning, and one on *Wednesday* evening. At *Trinity Chapel* there are two full services every *Sunday*, and one every *Thursday* evening, and at *Brearton* there is one service on *Sunday* afternoon. There are two curates for the parish, one paid by the vicar, the other provided by *The Church Pastoral Aid Society*. The population of the parish is nearly 6500.

The respondent claims to be entitled, for the purpose

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of ascertaining the rateable value of his rent charge within the meaning of The Parochial Assessments Act, 6 & 7 W. 4. c. 96., or otherwise, to reduce the sum to be ascertained as the gross estimated rental thereof, by the sum of 100*l.*, the curate's salary, and thereby reducing his assessment in the township of *Scriven with Tentergate* to a nominal assessment, the salary paid by the respondent to his curate exceeding the whole of his rent charge in the parish by the sum of 13*l.* 6*s.* 8*d.*, and of his net annual receipts from the tithe rent charge by the sum of 30*l.*

The appellants, on the other hand, claim to be entitled to apportion the amount of the curate's salary on the whole income of the vicarage, namely 386*l.* 13*s.* 4*d.*, derived from the rentcharge, the glebe, and the proceeds of the sale of glebe now invested by the Ecclesiastical Commissioners in the funds, and they have accordingly allowed and deducted a competent sum for that purpose from 60*l.* 1*s.* 4*d.*, the gross estimated rental of the rent charge arising in their township. Should the rent charge be the only part of the incumbent's income from which the curate's salary is to be primarily deducted, the appellants insist that the gross amount of the rent charge, namely 86*l.* 13*s.* 4*d.*, does not justify the respondent in engaging a curate to assist him, but imposes upon him the necessity of personally performing the duties of his cure; upon the ground that the employment of a stipendiary curate must be regulated with relation to the value of the incumbency, and that an income of 86*l.* 13*s.* 4*d.*, the gross value of the rent charge, is too small to entitle the incumbent to claim a deduction from the rateable value of the rent charge in respect of his curate's salary,

The justices made an order relieving the respondent entirely from the assessment, after deducting from the rate the amount of the curate's salary.

The questions for the opinion of the Court are :

First, are the appellants right in apportioning the curate's salary on the sum of 386*l.* 13*s.* 4*d.*, the income derived by the respondent from his vicarage, and deducting a relative proportion of such salary from the sum of 60*l.* 1*s.* 4*d.*, the amount of the rent charge arising in their township; or, is the respondent entitled to have his assessment reduced to a nominal assessment by reason of the salary paid to his curate exceeding the amount of the respondent's rent charge?

Secondly, should the Court be of opinion that the salary can only be apportioned on the rent charge, and not upon the income derived by the respondent from his glebe, and from the investment in the funds, is the rent charge such in amount as to entitle the incumbent to claim a deduction from the rateable value of the rent charge in respect of his curate's salary, so far as such rent charge extends?

If the Court shall be of opinion that the salary of the curate is to be apportioned on the whole income of the vicarage; or, if the Court shall be of opinion that the amount of the rent charge precludes the respondent from claiming any deduction from the rateable value of the rent charge in respect of the curate's salary, then the order of the justices is to be quashed. If the Court shall be of a contrary opinion, then the order of justices is to be confirmed and the rate reduced to a nominal amount.

F. M. White, for the respondent.—The necessity for

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the employment of a curate in order to the proper discharge of the ecclesiastical duties of the parish is shewn by the case, and the amount of the curate's salary is reasonable : therefore, according to the decision in the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*, the vicar is entitled to have the curate's salary allowed. The only question is, whether the whole of the salary should be deducted from the rent charge alone, or only such a proportion of it as the rent charge bears to the income of the vicarage from other sources. The justices were right in allowing the appeal and reducing the assessment to a nominal amount, as the curate's salary exceeds the total amount of the rent charge. [*Blackburn J.* But for the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)* I should have said that the employment of a curate does not diminish the value of the vicarage. *Corkburn C. J.* Granting that the employment of a curate is necessary, and that his salary is fair, why should it be thrown entirely on the rent charge?] The glebe farms, which form part of the endowment of the vicarage, are not in the district over which the pastoral charge of the vicar extends, and it would be hard upon the townships which are not benefited by the services of the curate that they should bear the burden of contributing to his support, by reason of the assessment in them being subject to a proportionate deduction in respect of his salary. In the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)* the curate's salary was deducted from the rent charge: *Coleridge J.*, in delivering the judgment of the Court, said, p. 48 :—"As first fruits

(a) *E. B. & E. 1. 52. 54.* See also *Williams*, appt., *The Overseers of Llangeinwen*, respts., 1 *B. & S. 699.*

and tenths are calculated on the whole annui proventus, and not on the tithes only, the allowance in respect of the rate on the rent charge must only be in the proportion which this bears to the whole annui proventus ;” but no such observation is made as to the allowance of the curate’s salary. No portion of the curate’s salary can be apportioned on the proceeds of the sale of glebe invested in the funds, because such property is not rateable. [*Blackburn J.* I do not see why the salary is not chargeable on funded property.] It is no more rateable than surplice fees or oblations.

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Price, for the appellants.—The correct mode of assessing the vicar is by apportioning the curate’s salary over the whole of the annui proventus of the benefice, viz., the tithe rent charge, the income from the glebe, and the income arising from the proceeds of the sale of glebe, in proportion to their respective amounts : it is a mere accident that the glebe land happens to be out of the pastoral charge of the vicar. In the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a) the tithe rent charges were the principal rateable property ; and the point as to the apportionment of the curate’s salary was not reserved. [He was then stopped by the Court.]

COCKBURN C. J. We are bound by the decision in the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a), that in an assessment to the poor rate the rector or vicar of a parish is entitled to have the stipend necessarily and properly paid to a

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curate deducted from the amount of the income derived from his benefice; but, assuming in the present case that the curate was necessarily employed and properly paid, the vicar is wrong in proposing to charge the stipend wholly on the tithe commutation rent charge. We think the true principle of that decision is, that the stipend should be charged upon the aggregate of all the annui proventus of the rectory or vicarage, and not upon one portion only. In the present case a new element is introduced, viz., that one of the sources of the income consists of glebe farms situate out of the pastoral charge of the respondent as vicar; and I cannot help feeling that it is hard on the townships in which the farms are situate that they, in assessing the occupiers, must make a deduction in respect of a proportion of the stipend of a curate from whose services they derive no benefit. But this is so exceptional a circumstance that we think it better not to disturb the principle which we think is the true one.

CROMPTON, BLACKBURN and MELLOR JJ. concurred.

Order quashed.

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Lord LONDESBOROUGH *against* FOSTER.Tuesday,
April 21st.

Where a person entitled to copyhold tenements in fee, who had never been admitted, and never sought admission to them, died, having devised all his property to his eldest son and heir: held,

1. That on the admission of the son the lord was entitled to two fines, one for the tenant's own admission, and the other as if his father had been admitted.

2. That the lord was not estopped from claiming this on the ground that the property was held in trust, and that he had admitted some of the cestui que trusts on payment of the accustomed fines.

Copyhold.
Admission.
Fines.
Trust.
Devise.

THIS was an action to recover money due to the plaintiff as lord of the manor of *Weighton with Shipton*, in the county of *York*, for the admission of the defendant to certain customary tenements within that manor.

The defendant pleaded: First. Never indebted. Second. As to 40*l.* 19*s.*, payment into Court in satisfaction.

The plaintiff joined issue on the first plea, and took the 40*l.* 19*s.* out of Court in satisfaction of so much of the causes of action.

A case stated by an arbitrator, under an order of nisi prius made by consent, disclosed the following facts.

In *August*, 1792, the premises in question were surrendered to the use of *Fanny Battle*, spinster, in fee, *H. G. Dales* being then in occupation. In *April*, 1793, she married *William Appleton*, and on the 26th *February*, 1795, surrendered to the use of *John Foster* and *H. G. Dales* in fee, to the trusts of an indenture of the same date. In *May*, 1795, she surrendered to the use of her will, in which she devised the premises to her husband *William Appleton* for life, remainder to her only child *Mary Ann Appleton*; both of whom were admitted

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tenants accordingly in *October, 1796, H. G. Dales* being still in occupation. During her father's life *Mary Ann Appleton* married *John Inman*, became a widow, and, previous to stat. 7 *W. 4* & 1 *Vict. c. 26.*, entered on the premises, and occupied them until her decease about 1860. In *October, 1801, H. G. Dales* surrendered to the use of *John Foster* and *William Appleton*, on the trusts of the deed of 26th *February, 1795. John Foster* survived his co-trustee, and died intestate about 1808, leaving *Richard Foster*, his eldest son and heir at law. *Richard Foster* was never admitted nor claimed to be admitted tenant of the premises; and died in 1854, having devised, in the same year, all his property of every description to the defendant, who was his only son and heir at law. All the above mentioned admissions were voluntary on the part of the persons admitted. The usual fines were paid on each. The defendant being desirous of disposing of the property, sought for and obtained the admission in 1860, as devisee under his father's will; on which occasion the plaintiff, as lord of the manor, claimed two fines from him, one in respect of his own admission, and the other as if his father had been admitted.

Brett, for the plaintiff.—The lord of the manor is entitled to this double fine. Although the defendant is heir at law to his father, he takes these lands as *devisee* by force of stat. 3 & 4 *W. 4. c. 106.*, sect. 3 of which enacts:—"When any land shall have been devised, by any testator &c., to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed &c., to the person or to the heirs of the person who shall thereby have conveyed

the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." And by sect. 4:—"When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance &c., or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will &c., then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land." And by stat. 7 *W. 4* & 1 *Vict.*

c. 26. s. 4. :—"Provided always where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator; Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be

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entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fines, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will: all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid." But if the defendant even did come in as *heir* to his father, it would make no difference. In 1 *Scriven on Copyholds*, 405, 3rd ed.:—"But if the heir of a copyholder die before admission, his heir or devisee could not compel admission, except on payment of a double fine;" citing *Morse v. Faulkner* (a). The lord is not estopped from claiming this fine in consequence of his having admitted the *cestui que trusts*, for the defendant does not claim under them.

Horace Lloyd, contra.—The lord could not have compelled the deviser to come in for admission and pay a fine, during his life, and therefore cannot now require of the defendant, either as his heir or devisee, to pay a fine for such imaginary admission. The lord was estopped from requiring admission of *Richard Foster*, in consequence of the premises having been full by the lord's acceptance of the *cestui que trusts*, and the fines taken on their

(a) 1 *Anst.* 11. 13.

admissions. [*Crompton J.* There may be an estoppel the other way. When the defendant comes in, is he not estopped from saying that he does not take through *Richard Foster*? A stranger coming in on the rolls makes no difference.] In *Garland v. Alston (a)*, where the surrenderee of a remainder in a copyhold estate died in the lifetime of the tenant for life, it was held that on the decease of the tenant for life the heir of the surrenderee was entitled to be admitted on payment of a single fine. *Watson B.* there says, p. 395 :—"If the heir is entitled only on the ground that the ancestor was entitled to be admitted, and the lord could have compelled the ancestor to come in and pay his fine on admittance, the heir must pay a double fine:" but that dictum must be understood with reference to cases where the fine in regular course would have been payable by the ancestor.

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Brett was not called on to reply.

COCKBURN C. J. Our judgment must be for the plaintiff. Perhaps the defendant could not have compelled the lord to admit him; and the lord on his part might have avoided calling on the father to come in and be admitted. But when the defendant, who has the legal estate, comes in himself for admission, the lord may say, "I will admit you, but will claim two fines, one in respect of your own admission, and the other in respect of your father as if he had been admitted."

CROMPTON and BLACKBURN JJ. concurred.

Judgment for the plaintiff.

(a) 3 H. & N. 390.

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Wednesday,
April 29th.

The QUEEN *against* The Vestry and Church-
wardens of ST. PANCRAS.

Poor rate.
Railway.
Rateable value.
Toll paid for
passengers
carried over
another rail-
way.

The appellants' railway, after passing through the respondent among other parishes, joined the *L. and B. Railway*, which formed the only access and outlet of their railway to and from *L.* By deed dated 14th April, 1857, the appellants were to be at liberty to carry their traffic over the *L. and B. Railway* upon the terms of paying to the *L. and B. Company* a certain toll for every passenger. The appellants accordingly conveyed their passengers in trains consisting of their own carriages, along their line and over the *L. and B. line*, charging but one fare for conveying a passenger from any part of their line to any other part of their line, or to any part of the *L. and B. line*, and paid to the *L. and B. Company* the agreed tolls. On appeal against a poor rate, held that, in ascertaining the rateable value of the appellants' railway in the respondent parish, the tolls paid to the *L. and B. Railway Company* should first be deducted.

ON appeal to the *Middlesex* Quarter Sessions against a rate for the relief of the poor of the parish of *St. Pancras*, in the county of *Middlesex*, made the 19th March, 1859, by the vestry and churchwardens of that parish, wherein *The North London Railway Company* were assessed on a rateable value of 4000*l.*, the Quarter Sessions amended the rate by reducing that sum to 595*l.*, subject to a case for the opinion of this Court.

In that rate the property occupied by the appellants within the parish was described as "Land on which the railway is formed, and embankments, viaducts, arches, bridges and stations:" its name or situation "*From Maiden Lane to the west side of Humpstead Road*:" the gross estimated rental was 4444*l.*, and the rateable value 4000*l.*

The appellants duly appealed against the rate upon the grounds, amongst others, that they were rated at a

higher and greater amount than they ought to have been, and were over rated in respect of their rateable property in the parish.

The appellants are the owners of a line of railway which, for the purposes of the case, was to be taken to commence at a place known as the *Hampstead Road Terminus* of the *North London Railway*, and after passing through the parishes of *St. Pancras*, *St. Mary, Islington*, and *Hackney*, to end at a place in the parish of *Bow*, in the county of *Middlesex*, called "*The Bow Junction*," where it joins a system of railways the property of *The London and Blackwall Railway Company*, and which form the only access and outlet of the *North London Railway* to and from the city and adjacent parts of *London*. The *North London Railway* to the point of junction, and the *London and Blackwall Railway* from thence, together form a continuous line of railway to the city. The *London and Blackwall Railway* extends westward from *Bow Junction* to *Fenchurch Street*, in the city of *London*, where the *London and Blackwall Company* have a principal central station, and also extends eastward from *Stepney* to *Blackwall*, and other places also eastward. The *North London Railway* to *Bow Junction* is $7\frac{1}{2}$ miles long. The *London and Blackwall Railway*, from the *Bow Junction* to *Fenchurch Street*, is $1\frac{1}{2}$ miles long. The part of the *North London Railway* which is within the parish of the respondents is 96 chains in length. The *London and Blackwall Company*, by their Acts, 6 & 7 *W. 4. c. cxxiii.* and 9 & 10 *Vict. c. cclxxiii.*, are empowered to demand and receive a toll not exceeding 9*d.* for every person conveyed over their railway. A very large portion of the value of and source of profit to the

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1863. *North London* Railway is its access and outlet by means of the *London and Blackwall* Railway to *Fenchurch Street*.
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In the year 1857 the appellants entered into an agreement by deed with *The London and Blackwall Railway Company*, dated 14th April, 1857. (A copy of this deed was to be taken as part of the case.) By this the appellants were to be at liberty to carry their traffic over the *London and Blackwall* Railway to *Fenchurch Street*, *Stepney*, or *Shadwell*, upon the terms of paying to the *London and Blackwall* Company the net tolls following,—on every single journey ticket 1*d.* per passenger, and on every return ticket 1*d.* per passenger,—with a provision that, if the appellants increased their fares beyond certain rates therein mentioned, the tolls payable to the *London and Blackwall* Company should be increased pro ratâ in proportion to such increased rate. From the execution of the deed down to the making of the rate the appellants conveyed their passengers in trains consisting of their own carriages along the *North London* line and over the *Blackwall* line to *Fenchurch Street*; and (making no difference between long distances and short distances) charged but one fare for conveying a passenger from any part of the *North London* line to any other part of the *North London* line, or to any part of the *Blackwall* line. The fares charged by the appellants during the periods aforesaid were for the first class passengers, single ticket 6*d.* and return ticket 9*d.*; for the second class passengers single ticket 4*d.*, return ticket 6*d.* (being the rates mentioned in the agreement): and out and in respect of each of such fares the appellants paid to the *London and Blackwall* Company the agreed tolls of 1*d.* and 1½*d.* provided for by the deed of 1857.

In estimating, for the purposes of the rate, the gross receipts earned by the appellants in respect of that part of the *North London* line situate in the respondents' parish, the appellants charged themselves with the residue of such fares, after deducting the tolls so paid. To this the respondents objected, and contended that the appellants were not entitled, for the purpose aforesaid, to deduct those tolls from the gross receipts: but the Sessions allowed the deduction.

The appellants also, according to the deed, carried all the *Bow* passenger traffic of the *London and Blackwall* Railway to and from *Fenchurch Street*.

The *London and Blackwall* Company brought into account for assessment the sum of 10,909*l.*, received by them from the *North London* Company, without deducting locomotive expenses or locomotive stock, but were not actually assessed in that sum.

The Sessions found as a fact that the payments made by the appellants to the *London and Blackwall* Company were reasonable, and reduced the rate to the sum of 595*l.*

The questions for the opinion of the Court were:—

First. Whether, in ascertaining the rateable value of the subject of the rate, any sum should be deducted in respect of the payments by the appellants to the *London and Blackwall* Company.

Second. Whether, if any sum ought to be deducted, the sums mentioned in the agreement payable by the appellants to the *London and Blackwall* Company for passenger tolls are the sums that ought to be deducted.

If the Court should answer both questions in the affirmative, the order of Sessions and amendment were to stand confirmed.

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1863. If the Court should answer either question in the negative, the order of Sessions was to be quashed, the amendment set aside, and the rateable value to stand at 1685*l*.

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Field, for the appellants.—The sums received by the appellants for the conveyance of passengers over the *London and Blackwall* Railway, and, in pursuance of the deed of the 14th *April*, 1857, paid by them to the *London and Blackwall* Company, were properly deducted in order to arrive at the net rateable value of the appellants' railway. Those sums are an outgoing which a tenant intending to take the *North London* Railway on lease would have to pay for the privilege of sending passengers over the *London and Blackwall* Railway. Also, they are rateable to the parish in which the *London and Blackwall* line is situated; and therefore are not rateable in *St. Pancras*. [He was then stopped.]

Overend and *Keane*, for the respondents.—First. The privilege of using the *London and Blackwall* Railway is to be treated as a landlord's improvement. If the appellants had paid a gross sum for that privilege they would not have been able to repay themselves by deducting a portion of every fare received from the passengers carried. If the hypothetical landlord had purchased the privilege, a tenant, in estimating the profits, would have no right to deduct the interest upon the purchase money. [*Blackburn J.* Suppose the occupier of a market garden outside one of the turnpikes near *London* entered into an agreement for a composition by which his carts should go through the gate free, would the effect of that be to enhance the annual rent of the market garden, or would

it be a personal privilege?] Here the privilege is not purchased by the tenant. Suppose the owner purchased the right of going through the gate toll free, and he let the premises with that right, the rent would be higher on that account, and the tenant would be rated higher. [*Cockburn C. J.* The sums in question are an incidental outgoing on which the tenant can get no profit. He pays them in the shape of interest to the landlord who has capitalized the purchase money of the privilege. Whether the supposed landlord bought it in the first instance, or whether the supposed tenant pays so much for it periodically, it is a payment upon which no profit arises to the tenant, and must be taken out of the account before the profits are calculated.]

Secondly. Supposing these tolls are not a landlord's improvement, but a tenant's outgoing, they should not be deducted until after the gross receipts have been estimated. When that has been done, the deductions should be distributed over all the parishes through which both railways pass, and the difference in the result is that the rateable value of the appellants' railway in the respondent parish will be 1685*l.* instead of 595*l.* The appellants have no right to treat the sums received by them for the *London and Blackwall* Company as if such sums had never existed. [*Blackburn J.* The Parochial Assessments Act, 6 & 7 *W. 4. c. 96.*, does not mention gross receipts. *Cockburn C. J.* These tolls are no part of the gross receipts of the appellants: they are received by them for the *London and Blackwall* Company, in respect of the conveyance of passengers over their railway. The arrangement between these two Companies is the same as that which must exist between several different Com-

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panies when a passenger pays his fare in *London*; e. g., to *The London and North Western Railway Company*, for a ticket which enables him, in the course of his journey, to pass over the lines of other Companies. The proportion of that fare taken in respect of the other lines would not be taken into account in ascertaining the rateable value of the *London and North Western Line*. *Crompton J.* The argument for the respondents must be that the *North London Railway* would be nothing without the *London and Blackwall Railway*.]

COCKBURN C. J. I think it is quite clear that the Sessions came to a right decision. We have frequently had ground to complain of the inapplicability of the principle laid down in The Parochial Assessments Act, 6 & 7 W. 4. c. 96., to the case of railways; but here the principle applies very well, because any person calculating the yearly value of the *North London railway* in the parish of *St. Pancras* to a tenant would exclude from consideration the toll taken by the appellants in respect of that portion of the line which belongs to the *London and Blackwall Company*. The entire line run over, between the *Hampstead Road Terminus* of the *North London Company* and the *Fenchurch Street Station* of the *London and Blackwall Company* consists of two distinct railways. The *North London Company*, but for an arrangement with the *London and Blackwall Company*, would be obliged to deposit their passengers at the end of their railway; accordingly, for the convenience of their passengers, and also with a view to attract passengers to their own line, they arrange with the *London and Blackwall Company* to send on their passengers to

the *London* terminus of the latter Company, and receive for and pay to that Company what they would charge for the conveyance of the passengers over their railway. The result is that none of this money goes into the pockets of the *North London* Company; and, therefore, any person calculating the value of the *North London* Line would exclude all consideration of these sums seeing that they are received merely on behalf of the *London* and *Blackwall* Company, and consequently cannot be taken into account in determining what a tenant from year to year would give. And the justice of this is manifest: the *London* and *Blackwall* Company are rateable in their parish in respect of these very receipts as a source of profit from their railway, and I am at a loss to see why the parish of *St. Pancras* should have the benefit of the payments. If the parish of *St. Pancras* received a rate in respect of it from the appellants, and the *London* and *Blackwall* Company, receiving the toll as a profit, were also to pay a rate in respect of it, a rate would be levied in two different parishes upon the same subject-matter, which would be manifestly unjust.

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CROMPTON, BLACKBURN and MELLOR JJ. concurred.

Order of Sessions affirmed.

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Wednesday,
April 27th.
Friday,
May 8th.

MATILDA HORNER, executrix, against GEORGE LUFF, GEORGE JOHN ARMSTRONG LUFF and another.

Garnishee.
Common Law
Procedure Act,
17 & 18 Vict.
c. 125. s. 64.
Bail.
Arrest.
1 & 2 Vict.
c. 110. s. 2.

A garnishee, against whom a judgment creditor has obtained leave to proceed by writ, calling upon him to shew cause why there should not be execution against him under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 64.*, cannot be held to bail or arrested under stat. 1 & 2 *Vict. c. 110. s. 2.*

THIS was an application for an order directing that the defendant *G. J. A. Luff* should be held to bail.

It appeared from the affidavit of the plaintiff that a writ of summons in this action had issued against the defendants for having unlawfully and maliciously, and without any reasonable or probable cause or excuse, colluded and conspired together to deprive the plaintiff of moneys which had become due to her as executrix, and of the satisfaction of a judgment for 1100*l.* recovered by her, as executrix, on the 17th *May*, 1862, against the defendant *George Luff*, who was the father of the defendant *G. J. A. Luff*; that 894*l.* 12*s.* 6*d.* was still due thereon; that, on 22d *May*, a fieri facias was issued upon that judgment, under which goods and chattels of the defendants *George Luff* and *G. J. A. Luff*, who carried on business in partnership, were seized. The defendant *G. J. A. Luff* thereupon made a claim to those goods and chattels, as being his sole property, and an order was made that an interpleader issue should be tried between the plaintiff and him. On the trial of that issue before *Crompton J.*, at the *London* Sittings after *Michaelmas* Term in 1862, a verdict was taken by consent for 300*l.*, part of the pro-

duce of the goods, without prejudice to any proceedings by the plaintiff against the defendant *George Luff*, or to any process of attachment against his money in the hands of the defendant *G. J. A. Luff*. Upon that trial *G. J. A. Luff* was called as a witness, and deposed that in *February*, 1860, he and the plaintiff *George Luff* had agreed to dissolve partnership, and that he had purchased the partnership at a valuation, and had paid for the same by six bills of exchange for 646*l.* 3*s.* 9*d.* each, and that five of such bills were still unpaid. Afterwards the plaintiff caused proceedings to be taken, under The Common Law Procedure Act, 1854, to attach the money due upon the bills remaining unpaid in the hands of *G. J. A. Luff*, and obtained leave from a Judge to proceed against him by writ under sect. 64 of that Act. The affidavit concluded with stating that *G. J. A. Luff* had lately sold the partnership business, and that it was his intention shortly to quit *England*, in order to avoid payment of any claim the plaintiff might establish against him under the garnishee proceedings in this action.

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J. Simon, in support of the application.—This is an action within sect. 2 of stat. 1 & 2 *Vict. c.* 110., which enacts that if a plaintiff in any action in one of the superior Courts of law at *Westminster* shall, by affidavit, shew, to the satisfaction of a Judge, that he has a cause of action against the defendant to the amount of 20*l.*, or upwards, and that the defendant is about to quit *England*, the Judge may direct that the defendant shall be held to bail, and thereupon the plaintiff may sue out a writ of *capias* against the defendant. The garnishee clauses of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c.* 125., put the garnishee in the position of being

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answerable to a judgment creditor. By sect. 64, "If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to shew cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under 'The Common Law Procedure Act, 1852.'" [*Blackburn J.* In *Agassiz v. Palmer (a)*, an order directing that the defendant in a proceeding by scire facias should be held to bail was set aside. *Tindal C. J.* there says, "The nature and object of the writ of scire facias is, to call upon the defendant to shew cause why execution should not issue against him, and the old process was by summons and distringas, but no process ever issued to take the person of the defendant. If, therefore, the proceedings by scire facias are to be looked upon as the commencement of a new action, no capias can be granted, as the second and third sections of the 1 & 2 Vict. c. 110. refer only to actions where the defendant was liable to arrest at the time of the passing of that statute; if, on the other hand, a scire facias is to be treated as the continuance of an old action, then the right to issue the capias is excluded by the terms of the fifth section." Those reasons are in point as to the garnishee writ given by The Common Law Procedure Act, 1854, sect. 64.] The only analogy between that writ and the writ of scire facias is in the form of proceeding. [*Crompton J.* The effect of both writs is the same, viz., making the person a party to the cause. *Blackburn J.* The Legislature in sect. 64, de-

(a) 1 D. & L. 18. 20; 5 M. & Gr. 697, 699.

scribing the object of the writ against the garnishee, use the very words which describe the writ of scire facias. *Crompton J.* I am afraid that is so. Could you apply to the Court of Chancery for a writ ne exeat regno?]

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PER CURIAM. (COCKBURN C. J., CROMPTON, BLACKBURN and MELLOR JJ.)

Application refused.

May 8. *J. Simon* applied for an order directing that a writ of capias should issue against the defendant *G. J. A. Luff*, urging that he had colluded with the defendant *George Luff* to deprive the plaintiff of the fruits of her judgment against the latter. [*Blackburn J.* The Court cannot make the order: there is no cause of action.]

PER CURIAM. (COCKBURN C. J., CROMPTON, BLACKBURN and MELLOR JJ.)

Application refused.

WILKINSON *against* DUTTON.

Saturday,
May 2d.

Under 24 & 25 *Vict. c. 100. s. 42.*, a female charged a man before justices of the peace with an assault, and on her examination deposed not only that he had assaulted her and hurt her knee, but that he had connexion with her, though she "did not consent, and did what she could to resist him." The other evidence shewed that the part of her statement which related to indecent assault was very improbable, and the justices, disbelieving it, convicted him of an assault: Held that they had jurisdiction to do so, although the evidence, if believed, disclosed a felony.

Jurisdiction
of justices.
24 & 25 Vict.
c. 100. s. 42.
Assault.
Evidence of
felony.

THE following case was stated by justices under stat.
20 & 21 *Vict. c. 43.*

At a Petty Sessions holden at the *Northleach* Petty

1863. Sessions Court at *Hampnett*, for the division of *North-leach*, in the county of *Gloucester*, on the 19th day of *November*, 1862, the information and complaint of *Jane Dutton* (hereinafter called the respondent) against *Thomas Wilkinson* (hereinafter called the appellant), made in writing on oath before the Rev. *Frederick Biscoe*, one of the undersigned justices of the peace, on the 17th day of *November*, 1862, under stat. 24 & 25 *Vict. c. 100. s. 42.*, whereby the respondent, on her oath, declared that, on the 1st *November*, the appellant unlawfully assaulted her, at the parish of *Hampnett*, in the said county, contrary to the form of the statute &c., was heard and determined by us, the said justices, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to be imprisoned in the common gaol of *Gloucester*, for the county of *Gloucester*, for the term of one month.

The case then set out the evidence before the justices. The respondent deposed that, on the occasion in question, the appellant had not only assaulted her and hurt her knee, but that he had connexion with her, though she "did not consent, and did what she could to resist him." The other evidence, however, shewed that that part of her statement which related to indecent assault was very improbable, and the justices, disbelieving it, convicted the appellant of an assault.

Sawyer, for the respondent.—The conviction took place under stat. 24 & 25 *Vict. c. 100. s. 42.*, which enacts:—"Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may

hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5*l.*; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid." It is no objection to this conviction for an assault that evidence was given before the magistrates which, if believed, shewed that a rape had been committed. [Cockburn C. J. Has not this point been recently before this Court?] Yes. In *Ex parte Thompson* (a) an information was laid against a man for "assaulting and abusing" a woman, who, on the hearing, gave evidence to shew that he had committed a rape on her. The justices having convicted him of an aggravated assault under stat. 16 & 17 *Vict. c. 30. s. 1.* (b), this Court held the conviction good. On a subsequent application in the same case to the Court of Exchequer (c), that Court was equally divided in opinion; Pollock C. B. and Wilde B. holding that, as the evidence disclosed a

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(a) 6 *Jur. N. S.* 1247.(b) 16 & 17 *Vict. c. 30. s. 1.* was repealed by 24 & 25 *Vict. c. 95.*, and re-enacted by 24 & 25 *Vict. c. 100. s. 43.*(c) 6 *H. & N.* 193.

1863. rape or an attempt to commit one, the justices had no jurisdiction; *Bramwell* and *Channell* BB. holding the contrary, on the ground that the information charged an assault, and it was possible the justices might have believed the evidence as to that, and disbelieved the rest. The decision of *this* Court is in favour of the respondent, whereas the case in the Exchequer only leaves a doubt. [He was then stopped.]

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Powell, contra.—[*Cockburn* C. J. We are bound by the decision of this Court in *Ex parte Thompson* (a), which was unanimous. *Crompton* J. There has since been a case, under 9 G. 4. c. 31. ss. 27—29, where a complaint of assault and battery having been made before two justices of the peace, who dismissed the complaint, and gave the accused a certificate accordingly, that certificate was held a bar to an indictment founded on the same facts, charging assault and battery accompanied by malicious cutting and wounding, so as to cause grievous bodily harm (b). That seems conclusive on this matter.] It must be conceded that the present case cannot be distinguished from *Ex parte Thompson* in this Court (a), but the difference of opinion in the Court of Exchequer (c) shews that the question is an important one. [Cockburn C. J. We will not presume that justices would so far depart from their duty as to abuse their powers in the manner there suggested. It is better for justices of the peace to dispose of a matter

(a) 6 *Jur. N. S.* 1247.

(b) The learned Judge doubtless refers to *Reg. v. Elrington*, 1 B. & S. 688.

(c) 6 *H. & N.* 193.

like this as a common assault than to send it for trial as a case of rape, where the accused would most likely be acquitted.] The evidence here discloses a case of rape. [*Cockburn* C. J. The evidence, so far as it relates to rape, ought not to be believed. *Crompton* J. This Court, in a case to which I was not party (*a*), most wisely thought that the justices have a discretion as to whether they will treat a charge of assault as a case of common assault or not. But if they do treat it as a common assault their decision is final. *Cockburn* C. J. I think the arguments used in the Exchequer, by *Pollock* C. B., and *Wilde* B., in *Ex parte Thompson* (*b*), wholly unconvincing.]

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Sawyer was not called on to reply.

PER CURIAM. (COCKBURN C. J., CROMPTON, BLACKBURN and MELLOR JJ.)

Conviction affirmed.

(*a*) See note (*b*), p. 824.

(*b*) 6 H. & N. 193.

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Wednesday,
May 6th.

TAYLOR and another *against* CALDWELL and
another.

*Contract.
Accidental
destruction
of the subject-
matter.
Demise or
agreement for
demise.*

1. Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.

2. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied.

3. Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

4. *A.* agreed with *B.* to give him the use of a Music Hall on certain specified days, for the purpose of holding concerts, with no express stipulation for the event of the destruction of the Music Hall by fire: held, that both parties were excused from performance of the contract.

5. An instrument is not a demise, although it contains the usual words of demise, if its contents shew that such was not the intention of the parties.

THE declaration alleged that by an agreement, bearing date the 27th *May*, 1861, the defendants agreed to let, and the plaintiffs agreed to take, on the terms therein stated, *The Surrey Gardens and Music Hall, Newington, Surrey*, for the following days, that is to say, *Monday* the 17th *June*, 1861, *Monday* the 15th *July*, 1861, *Monday* the 5th *August*, 1861, and *Monday* the 19th *August*, 1861, for the purpose of giving a series of four grand concerts and day and night fêtes, at the Gardens and Hall on those days respectively, at the rent or sum of 100*l.* for each of those days. It then averred the fulfilment of conditions &c., on the part of the plaintiffs;

and breach by the defendants, that they did not nor would allow the plaintiffs to have the use of *The Surrey Music Hall and Gardens* according to the agreement, but wholly made default therein, &c.; whereby the plaintiffs lost divers moneys paid by them for printing advertisements of and in advertising the concerts, and also lost divers sums expended and expenses incurred by them in preparing for the concerts and otherwise in relation thereto, and on the faith of the performance by the defendants of the agreement on their part, and had been otherwise injured, &c.

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Pleas. First. Traverse of the agreement.

Second. That the defendants did allow the plaintiffs to have the use of *The Surrey Music Hall and Gardens* according to the agreement, and did not make any default therein, &c.

Third. That the plaintiffs were not ready or willing to take *The Surrey Music Hall and Gardens*.

Fourth. Exoneration before breach.

Fifth. That at the time of the agreement there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the agreement was made, known to the plaintiffs and the defendants, and with reference to which they agreed, and which was part of the agreement, that in the event of the Gardens and Music Hall being destroyed or so far damaged by accidental fire as to prevent the entertainments being given according to the intent of the agreement, between the time of making the agreement and the time appointed for the performance of the same, the agreement should be rescinded and at an end; and that the Gardens and Music Hall were destroyed and so far damaged by accidental fire as to prevent the entertainments, or any

1863. of them, being given, according to the intent of the agreement, between the time of making the agreement and the first of the times appointed for the performance of the same, and continued so destroyed and damaged until after the times appointed for the performance of the agreement had elapsed, without the default of the defendants or either of them.

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Issue on all the pleas.

On the trial, before *Blackburn J.*, at the *London* Sit-tings after *Michaelmas* Term, 1861, it appeared that the action was brought on the following agreement :—

“ *Royal Surrey Gardens,*

“ 27th *May*, 1861.

“ Agreement between Messrs. *Caldwell & Bishop*, of the one part, and Messrs. *Taylor & Lewis* of the other part, whereby the said *Caldwell & Bishop* agree to let, and the said *Taylor & Lewis* agree to take, on the terms hereinafter stated, *The Surrey Gardens and Music Hall, Newington, Surrey*, for the following days, viz. :—

“ *Monday*, the 17th *June*, 1861,

„ „ 15th *July*, 1861,

„ „ 5th *August*, 1861,

„ „ 19th *August*, 1861,

for the purpose of giving a series of four grand concerts and day and night fêtes at the said Gardens and Hall on those days respectively at the rent or sum of 100*l.* for each of the said days. The said *Caldwell & Bishop* agree to find and provide at their own sole expense, on each of the aforesaid days, for the amusement of the public and persons then in the said Gardens and Hall, an efficient and organised military and quadrille band, the united bands to consist of from thirty-five to forty members ; al fresco entertainments of various descriptions ; coloured min-

strels, fireworks and full illuminations ; a ballet or divertissement, if permitted ; a wizard and Grecian statues ; tight rope performances ; rifle galleries ; air gun shooting ; Chinese and Parisian games ; boats on the lake, and (weather permitting) aquatic sports, and all and every other entertainment as given nightly during the months and times above mentioned. And the said *Caldwell & Bishop* also agree that the before mentioned united bands shall be present and assist at each of the said concerts, from its commencement until 9 o'clock at night ; that they will, one week at least previous to the above mentioned dates, underline in bold type in all their bills and advertisements that Mr. *Sims Reeves* and other artistes will sing at the said gardens on those dates respectively, and that the said *Taylor & Lewis* shall have the right of placing their boards, bills and placards in such number and manner (but subject to the approval of the said *Caldwell & Bishop*) in and about the entrance to the said gardens, and in the said grounds, one week at least previous to each of the above mentioned days respectively, all bills so displayed being affixed on boards. And the said *Caldwell & Bishop* also agree to allow dancing on the new circular platform after 9 o'clock at night, but not before. And the said *Caldwell & Bishop* also agree not to allow the firework display to take place till a $\frac{1}{4}$ past 11 o'clock at night. And, lastly, the said *Caldwell & Bishop* agree that the said *Taylor & Lewis* shall be entitled to and shall be at liberty to take and receive, as and for the sole use and property of them the said *Taylor & Lewis*, all moneys paid for entrance to the Gardens, Galleries and Music Hall and firework galleries, and that the said *Taylor & Lewis* may in their own discretion secure the patronage of any

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charitable institution in connection with the said concerts. And the said *Taylor & Lewis* agree to pay the aforesaid respective sum of 100*l.* in the evening of the said respective days by a crossed cheque, and also to find and provide, at their own sole cost, all the necessary artistes for the said concerts, including Mr. *Sims Reeves*, God's will permitting.

(Signed) "*J. Caldwell.*"

"Witness

"*Chas. Bishop.*"

(Signed) "*S. Denis.*"

On the 11th *June* the Music Hall was destroyed by an accidental fire, so that it became impossible to give the concerts. Under these circumstances a verdict was returned for the plaintiff, with leave reserved to enter a verdict for the defendants on the second and third issues.

Petersdorff Serjt., in *Hilary* Term, 1862, obtained a rule to enter a verdict for the defendants generally.

The rule was argued, in *Hilary* Term, 1863 (*January* 28th); before COCKBURN C. J., WIGHTMAN, CROMPTON and BLACKBURN JJ.

H. Tindal Atkinson shewed cause.—First. The agreement sued on does not shew a "letting" by the defendants to the plaintiffs of the Hall and Gardens, although it uses the word "let," and contains a stipulation that the plaintiffs are to be empowered to receive the money at the doors, and to have the use of the Hall, for which they are to pay 100*l.*, and pocket the surplus; for the possession is to remain in the defendants, and the whole tenor of the instrument is against the notion of a letting. Whether an instrument shall be construed as a lease or

only an agreement for a lease, even though it contains words of present demise, depends on the intention of the parties to be collected from the instrument; *Morgan d. Dowding v. Bissell* (a). *Christie v. Lewis* (b) is the nearest case to the present, where it was held that, although a charter party between the owner of a ship and its freighter contains words of grant of the ship, the possession of it may not pass to the freighter, but remain in the owner, if the general provisions in the instrument qualify the words of grant.

Secondly. The destruction of the premises by fire will not exonerate the defendants from performing their part of the agreement. In *Paradine v. Jane* (c) it is laid down that, where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And there accordingly it was held no plea to an action for rent reserved by lease that the defendant was kept out of possession by an alien enemy whereby he could not take the profits.

Pearce, in support of the rule.—First. This instrument amounts to a demise. It uses the legal words for that purpose, and is treated in the declaration as a demise.

Secondly. The words "God's will permitting" override the whole agreement.

Cur. adv. vult.

(a) 3 *Taunt.* 65.

(b) 2 *B. & B.* 410.

(c) *Allyn*, 26.

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The judgment of the Court was now delivered by

BLACKBURN J. In this case the plaintiffs and defendants had, on the 27th *May*, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of *The Surrey Gardens and Music Hall* on four days then to come, viz., the 17th *June*, 15th *July*, 5th *August* and 19th *August*, for the purpose of giving a series of four grand concerts, and day and night fêtes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100*l.* for each day.

The parties inaccurately call this a "letting," and the money to be paid a "rent;" but the whole agreement is such as to shew that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the *Surrey Gardens* in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts

could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 *Roll. Abr.* 450, *Condition (G)*, and in the note (2) to *Walton v. Waterhouse (a)*, and is recognised as the general rule by all the Judges in the much discussed case of *Hall v. Wright (b)*. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied con-

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(a) 2 *Wms. Saund.* 421 a. 6th ed.(b) *E. B. & E.* 746.

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Condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. * For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. XLV., tit. 1, *de verborum obligationibus*, l. 33. "Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor." The principle is more fully developed in l. 23. "Si ex legati causa, aut ex stipulatū hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the *Roman* lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by *Pothier*, who in his *Traité des Obligations*, partie 3, chap. 6, art. 3,

§ 668 states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

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Although the Civil law is not of itself authority in an *English* Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by *English* law.

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, *e. g.* promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; *Hyde v. The Dean of Windsor* (a). See 2 *Wms. Exors.* 1560, 5th ed., where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord *Lyndhurst* in *Marshall v. Broadhurst* (b), and a case mentioned by *Patteson J.* in *Wentworth v. Cock* (c).

(a) *Cro. Eliz.* 552, 553.

(b) 1 *Tyr.* 348, 349.

(c) 10 *A. & E.* 42, 45-46.

1863. In *Hall v. Wright* (a) *Crompton J.*, in his judgment,
 TAYLOR puts another case. "Where a contract depends upon
 v. personal skill, and the act of God renders it impossible,
 CALDWELL as, for instance, in the case of a painter employed to
 paint a picture who is struck blind, it may be that the
 performance might be excused."

It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps in the case of the painter of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle; as is illustrated by the following example. In the ordinary form of an apprentice deed the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 *Chitty on Pleading*, 370, 7th ed. by *Greening*.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father? Yet the only reason why it would not is that he is excused because of the apprentice's death.

(a) *A. B. & E.* 746, 749.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the *English* law is established by the case of *Rugg v. Minett* (a), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule in the Civil law, and it is worth noticing that *Pothier*, in his celebrated *Traité du Contrat de Vente* (b), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See *Blackburn on the Contract of Sale*, p. 173.

The same principle seems to be involved in the

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(a) 11 *East*, 210.

(b) See Part. 4, § 307, &c.; and Part. 2, ch. 1, sect. 1, art. 4, § 1.

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decision of *Sparrow v. Soagate* (a), where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to *Williams v. Lloyd* (b). In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And *Jones*, adds the report, cited 22 *Ass.* 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed that notwithstanding the promise no action would have lain had there been no neglect or default on his part.

It may, we think, be safely asserted to be now *English* law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or

(a) *W. Jones*, 29.

(b) *W. Jones*, 179.

bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of *Coggs v. Bernard* (a) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in *English* law except in the case of bailments; but the case of *Williams v. Lloyd* (b), above cited, shews that the same law had been already adopted by the *English* law as early as *The Book of Assises*. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

(a) 1 *Smith's L. C.* 171, 5th ed.; 2 *L. Raym.* 909.

(b) *W. Jones*, 179.

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We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

*Wednesday,
May 6th.*

DICKINSON *against* ANGELL.

*Action on
judgment.
Costs.
43 G. 3. c. 46.
s. 4.
7 & 8 Vict.
c. 96. s. 57.*

Where an action is brought upon a judgment for a sum not exceeding 20*l.* for the purpose of enabling the plaintiff, by adding the costs to the sum recovered by the judgment, to recover a sum exceeding 20*l.*, and so to issue a *capias* and defeat the object of stat. 7 & 8 *Vict.* c. 96. s. 57., the discretion of the Court under stat. 43 *G. 3. c. 46. s. 4.* as to granting costs to the plaintiff is not taken away by the later statute, but they will be guided in the exercise of that discretion by its provisions.

THIS was an action brought to recover 78*l.* 13*s.*, being the amount recovered by the plaintiff against the defendant by a judgment for 14*l.* 13*s.* 4*d.* debt, and 63*l.* 19*s.* 8*d.* costs. The defendant pleaded *nul tiel record*.

The original action was brought upon a schoolmaster's bill for 34*l.* 2*s.* 6*d.* The plaintiff paid into Court 19*l.* 9*s.* 2*d.*, and pleaded a set off as to the residue for rent due to him from the plaintiff. At the trial the plaintiff obtained a verdict for 14*l.* 13*s.* 4*d.*, and his costs were taxed at 63*l.* 19*s.* 8*d.* making 78*l.* 13*s.* Judgment was signed on the 13th *January*, 1863.

The affidavit of the attorney for the plaintiff stated that the defendant, by indenture dated *February* 6th, 1860, assigned the furniture and effects in his dwelling-

house mentioned in the schedule thereto, together with a policy of insurance on his life, to trustees for the benefit of his wife and children, and by other indentures he mortgaged all his other property for an amount nearly equal to the value thereof; that by reason of the debt recovered in the action being under 20*l.*, the plaintiff was unable to arrest the defendant on a writ of *ca. sa.* on the judgment, and that the defendant had no property on which a writ of *fieri facias* could take effect; that by reason of the debt due from the defendant, exclusive of costs, being under 50*l.* the plaintiff was unable to proceed to have the estate of the defendant administered in the Court of Bankruptcy, he not being a trader; that the defendant, being an attorney and solicitor, would have paid the debt and costs due on the judgment so recovered against him, if the plaintiff had been in a position to issue and execute a writ of *ca. sa.* against him or to proceed against him in the Court of Bankruptcy; that the defendant filed a petition for protection from arrest and a schedule in the Court of Bankruptcy on *October* 18th, 1861, which was opposed on behalf of several creditors and was dismissed by the Court; that the defendant immediately after left the country in order to avoid his creditors, and did not return until just prior to the filing of a second petition and schedule on the 14th *February*, 1862, in which the only assets returned by him were 290*l.* 0*s.* 9*d.*, and no return was made of any goods or effects; that in the course of the proceedings in the second petition the defendant was examined and stated that after the settlement of the 6th *February*, 1860, he had not any other property except leasehold property, which was on mortgage; that this petition was opposed, and the defendant's

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The affidavit of the defendant stated that the set-off in the original action was for rent due to him from the plaintiff, in respect of premises wherein the plaintiff carried on his business as a schoolmaster; and that the answer made by the plaintiff was that he was not in fact tenant of those premises, but that his sister, *P. A. Dickinson*, was the tenant thereof, and that the jury found a verdict for the plaintiff on that ground; that he had since brought an action against *P. A. Dickinson* for the amount of the rent, and that she had pleaded to the action denying the tenancy, and that he had not received any portion of the rent, and that the attorney for the plaintiff had taken an assignment of the original debt and costs in that action, and was the real plaintiff in this action; that the attorney for the plaintiff caused a ca. sa. to be issued, and placed the same in the hands of the sheriff of *Middlesex* to execute, and that the officer of the sheriff came to his house to execute such writ on two or three occasions; but, in consequence of a notice served by his directions on the sheriff of *Middlesex* that his proceedings were illegal, the attorney for the plaintiff commenced this action upon the judgment debt and costs; that no writ of fi. fa. had been issued, and that if such writ had been issued it would have been executed, and the full amount obtained from the defendant's residence irrespective of the settlement referred to, which was executed more than three years ago, as well as from other goods belonging to him of the value of 150*l.*, which he had purchased since the date of the indenture and before the 13th *January* 1863, on which day judgment was signed,

and from money at his bankers which might have been attached equal in amount to the judgment; that he was prepared to pay the amount of the judgment debt and costs in the original action forthwith; that the plaintiff was indebted to him as assignee of one Mr. *Davis* and Messrs. *Beck and Buckle*, upon judgments recovered against the plaintiff in an amount exceeding 120*l.*, and that the defendant had not received one shilling on account thereof; and that the plaintiff could not be found, and was absenting himself for the purpose of avoiding the payment of his debts.

An application had been made to *Mellor J.* at Chambers for a rule calling upon the defendant to shew cause why the plaintiff should not recover his costs, who referred the matter to the Court.

Lush, (*E. U. Bullen* with him), now moved for a rule accordingly.—By stat. 43 *G. 3. c. 46. s. 4.*, in all actions upon any judgment recovered, the plaintiff “shall not recover or be entitled to any costs of suit, unless the Court in which action on the judgment shall be brought, or some Judge of the same Court shall otherwise order.” Stat. 7 & 8 *Vict. c. 96. s. 57.*, reciting that it was expedient to limit the then existing power of arrest upon final process, enacts, “That from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained &c. in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment.” In *Slater v. Mackay* (*a*), which was decided five years after the passing of stat. 7 & 8 *Vict. c. 96.*, the Court of Common Pleas held that

(*a*) 8 *C. B.* 553.

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it had a discretion to give the plaintiff his costs in cases of this nature, and there exercised it in favour of the plaintiff on the ground that he had no other probable means of recovering his debt, and that his adopting the only available means of enforcing his judgment was met, not by a plea to the merits, but by a plea of *nul tiel* record. Those reasons apply in the present case. In *Adams v. Ready (a)*, the Court of Exchequer said that where an action was brought on a judgment for a debt under 20*l.* for the purpose of recovering a sum above 20*l.*, and issuing an execution against the person, they carried out the intention of the Legislature by holding, in the exercise of their discretion, that the plaintiff must bear the expense of it, and ought not to be allowed his costs. [*Blackburn J.* The reasoning of the Court of Exchequer goes to this, that the bringing of an action on the judgment under the circumstances was a frustration of stat. 7 & 8 *Vict. c. 96. s. 57. Cockburn C. J.* They thought that, the Legislature having enacted that a plaintiff shall not arrest a defendant where the sum recovered does not exceed 20*l.*, could not have contemplated that a plaintiff might accumulate the costs to the judgment. *Crompton J.* The Legislature, having in its mind stat. 43 *G. 3. c. 46.*, for preventing an attorney bringing an action on a judgment in order to get costs, may have relied upon our discretion in other cases.] In *Adams v. Ready (a)*, the defendant may have had no means of paying the debt, in which case he would be within the protection against imprisonment intended to be given to poor debtors by stat. 7 & 8 *Vict. c. 96. s. 57. [Cockburn C. J.* The Court of Exchequer do not put their judgment on that ground,

(a) 6 *H. & N.* 261.

but on this, that they ought not to exercise their discretion under the first Act so as to overrule the second.] The Court would not exercise their discretion in favour of a plaintiff who had been guilty of an evasion of the statute; but stat. 7 & 8 *Vict. c. 96. s. 57.* does not limit the discretion of the Court in the case of an action on a judgment. [*Crompton J.* You say the plaintiff has been driven by the conduct of the defendant to adopt a course which takes him out of the operation of the statute.] At the time of the passing of stat. 43 *G. 3. c. 46.* *prima facie* every action on a judgment was unnecessary, because in all cases a defendant could be taken on a *capias ad satisfaciendum*. [*Crompton J.* There is no impropriety in bringing an action on a judgment for a debt under 20*l.*, but which with the costs exceeds 20*l.*: that was conceded in *Adams v. Ready* (a), as well as in *Slater v. Mackay* (b). *Blackburn J.* cited *Mason v. Nicholls* (c).]

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J. Brown shewed cause in the first instance, and was contending that the Court would not, under the circumstances of the present case, exercise its discretion in favour of the plaintiff, when he was stopped.

COCKBURN C. J. I dissent from the Court of Exchequer to this extent,—that I think we still have a discretion under stat. 43 *G. 3. c. 46.*, as to granting costs in such cases as the present, and that stat. 7 & 8 *Vict. c. 96.* has not taken it away. Although the latter statute enacts that there shall not be an arrest upon final process when the sum recovered does not exceed 20*l.*, it has not

(a) 6 *H. & N.* 261.

(b) 8 *C. B.* 553.

(c) 14 *M. & W.* 118.

1863. taken away the right of a plaintiff who has recovered judgment for a debt not exceeding 20*l.* and who cannot take out execution, to bring an action on that judgment. Our discretion therefore remains. I however go the length of saying that the latter statute gives the Court a guide as to the exercise of its discretion; and if we saw that the action on the judgment was brought simply for the purpose of enabling the creditor by superadding the costs to the sum recovered by the judgment to recover a sum exceeding 20*l.*, and so to issue a *capias ad satisfaciendum* and defeat the object of the statute, we ought not assist the plaintiff by giving him the costs of the second action. But a discretion being left to us, we should be justified in doing so, where a plaintiff who has been baffled by the unrighteous proceedings of his debtor is entitled to avail himself of any remedy for recovering the fruits of his judgment. I agree with Mr. *Lush* that the intention of the Legislature was to protect persons who had no pecuniary means, and could give nothing to their creditors but the miserable satisfaction of incarcerating their bodies; and in such cases we should take the enactment as our guide and exercise our discretion in favour of the debtor. But where a defendant has means and has endeavoured to evade payment, we are not ousted of our jurisdiction. Here I was disposed to think that we might exercise our discretion by giving costs to the plaintiff, but Mr. *Brown* has shewn that there have been faults on both sides. Therefore, I am of opinion that the rule ought not to be granted, the plaintiff being left to avail himself of such remedy on the judgment as he may have.

CROMPTON, BLACKBURN and MELLOR JJ. concurred.

Rule refused.

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KILSHAW *against* JUKES, TILL and WYNN.Thursday,
May 7th.

1. The test whether a person who is not an ostensible partner in a trade, is nevertheless, in contemplation of law, a partner, is,—not whether he is entitled to participate in the profits; although this affords cogent, often conclusive evidence of it—but whether the trade has been carried on by persons acting on his behalf: per *Blackburn and Mellor JJ.*
2. *Qu.* per *Wightman J.*, of the authority of *Wilson v. Whitehead*, 10*M. & W.* 503?

Partnership.
Test of.

THIS was an action against three defendants *Joseph Jukes, George Sibson Till, and John Wynn*. The two latter having suffered judgment by default, the plaintiff declared against *Jukes* for goods sold and delivered, work and materials, and on accounts stated. Plea, never indebted. Issue.

On the trial, before *Willes J.*, at the *Liverpool* Summer Assizes, 1862, it appeared that the plaintiff, who was a timber merchant, brought this action to recover 133*l.* 2*s.* 10*d.*, the value of timber supplied to and upon the order of the defendants *Till* and *Wynn*, for some houses which they were then building in *Birkenhead*. The plaintiff who was not, at the time, aware that the defendant *Jukes* had any interest in these houses, relied on the following evidence to shew a concealed partnership between him and *Till* and *Wynn*.

It appeared from the evidence of the defendants *Jukes* and *Till*, who were examined as witnesses for the defence, that *Till* and *Wynn* were engaged in building speculations in which *Jukes* had no interest. He had, however, lent them various sums of money amounting in *January* 1862, to 189*l.*, when he refused to

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make them any further advances, and was pressing them for re-payment. It was then agreed between them that the three should join in taking a piece of land in their joint names; that *Till* and *Wynn* should erect on it the houses in question, *Jukes* supplying them with the ironmongery; that *Jukes* should be paid out of the proceeds of the houses the whole of his old loan of 189*l.*, and the price of what ironmongery he should supply for the purpose of the speculation, that any surplus should belong to *Till* and *Wynn*, and if the proceeds proved insufficient to pay him, *Jukes* was to be loser.

In pursuance of this arrangement the following agreement was entered into.

“AN AGREEMENT made this 28th day of *February*, 1862, between *Thomas Sanders*, of *Liverpool*, plasterer and builder, and *Joseph Barker*, of *Liverpool*, in the county of *Lancaster*, gentleman (as vendors of the land hereinafter described) of the one part, and *George Sibson Till*, and *John Wynn*, of *Birkenhead*, in the county of *Chester*, and *Joseph Jukes*, of *Tranmere*, *Birkenhead*, aforesaid, ironmonger, (as purchasers) of the other part, witnesseth that the said vendors agree to sell to the said purchasers, who agree to purchase from the said vendors at or for a price of 25*s.* per square yard, All that piece or parcel of land situate in *Birkenhead* in the county of *Chester* (setting out the situation and quantity.) And the said vendors agree to deduce a good title to the said land for an estate of freehold of inheritance in fee simple in possession subject to the conditions herein contained, and to deliver an abstract thereof to the said purchasers one month after request in writing, such abstract to commence with a conveyance from *Francis Richard Price*, Esq., by which conveyance all mines, and minerals, and fossils, com-

mons, and commonable rights, also all manorial and baronial rights and privileges, and seats and pews in *Birkenhead* Church, are saved, excepted and reserved to the said *Francis Richard Price*, his heirs and assigns, in manner therein mentioned, with which deduction of title the said purchasers shall be satisfied, and upon payment of the purchase money, and interest and advances, and all other moneys which shall be due by virtue of this agreement as hereinafter mentioned, the said vendors agree to convey the said land to the said purchasers, or as they shall appoint, such conveyance to be prepared by and at the purchasers' expense. And the said purchasers agree to build or cause to be built three dwelling-houses and shops at least fit for habitation, within four months from the date hereof, and to pay the purchase money of the first three houses and shops on or before the 30th day of *July* next, and to pay the purchase money of the remaining portion of the land on or before the 30th day of *October* next, and to pay interest thereon in the meantime and until the said purchase money shall be paid at the rate of 5*l.* per centum per annum, to be computed and commence from the 1st day of *June* next, upon the land and upon the advances from the respective dates of advance, and also to erect on the said land seven dwelling-houses or other buildings either with or without shops, and each of the houses shall be of not less value than 40*l.* per annum, the plans thereof to be approved of by the said vendors or their agent. And the purchasers further agree that, in each conveyance of the said land or part thereof, there shall be inserted a covenant on the part of the grantee or grantees, his or their heirs or assigns, to observe and perform the covenants and restric-

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tions affecting the said land mentioned and contained in the conveyance thereof from the said *Francis Richard Price*, Esq., (subject to which the said land is contracted to be sold), and also not to erect and suffer to be erected any houses in courts or places, alleys or passages, and not to suffer nor allow any cellars to be used or occupied as separate habitations, and also to bear and pay one half the expenses of making, sewerage and completing the several streets and roads upon which the said land abuts. It is further agreed the said vendors and all necessary parties shall from time to time convey to the said purchasers, or as they may direct, such lots or parcels of the said land as they may require upon receiving and being paid at the rate of 27*s.* per square yard for so much as they may require to be conveyed on account of the purchase money remaining due under this agreement; also all other moneys that may be advanced upon the said land, together with all interest thereon, the said purchasers bearing all the costs and expences attending such additional conveyances, with the exception of one abstract. And further that if the purchasers fulfil their part of this agreement the vendors shall, if required by the said purchasers, from time to time, advance to them such sums of money on materials not exceeding in the whole at one time 550*L.*, and as they may require and according to the schedule hereunder written, to enable them to erect and complete the buildings upon the said land, provided that such buildings are erected in a substantial and workmanlike manner, to the satisfaction of the said vendors or their agent, and that the value thereof shall be at least one third greater than the amount of advance required, the same to bear interest at the rate of 5*L.* per

cent. per annum, from the time of such advance until payment thereof. It is further agreed the purchasers may have immediate possession of the said land, and shall commence to build at least three dwelling houses thereon within six days from the date thereof, and shall proceed to finish the same with all reasonable dispatch, but will not be allowed to remove any clay, or dig and carry away any sand, or any other materials, whether the same are fixed or otherwise, which materials the vendors have lien upon for all moneys advanced and due by virtue of this agreement. Provided always, and it is hereby agreed between the said parties hereto, the said vendors shall not be required to obtain a conveyance to themselves of the legal estate in the said land, but the said purchasers, if required by the said vendors, shall take a conveyance thereof from the party or parties in whom the same is or might be vested; and inasmuch as the title deeds relating to the said land relate to other land of greater value, the purchasers shall be satisfied with a deed of covenant for the production thereof to be prepared by and at the expense of the purchasers, such covenant to be binding upon the holder of the deeds so long only as they remain in his custody: provided also that the purchasers shall bear all expenses attending the production and examination of the deeds not in the possession of the vendors, and the expenses of furnishing or obtaining all attested or other copies of or extracts from registers which the purchasers may require for any purpose, and that all recitals and statements in the said conveyance from the said *Francis Richard Price*, and in the conveyance to *Charles Monk, Esq.*, the owner of three undivided fourth parts or shares of and in the said land, of the remaining

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their heirs or assigns, at any time thereafter to enter upon the said land hereby contracted for, and any dwelling-house or other building which shall be thereon erected or erecting, and to finish and complete such of them as may be unfinished, if they shall think proper, but not otherwise, and to make sale and dispose of the said land and buildings finished or unfinished, mortgaged or unmortgaged, or any part or parts thereof, by public auction or private contract, and in one or more lots, for such price or prices as they shall think fit, and to convey and assure the same when sold to the purchaser or purchasers, or as they or he shall appoint, and to give valid discharges for the purchase money, so as to exonerate the purchaser from all liability as to the application thereof, and out of the purchase money which shall arise from such sale, after payment of the expense thereof, and the expense of finishing and completing any such houses and buildings as aforesaid, and also of insuring against damage by fire, (which the vendors are hereby authorized, but not bound to do), with interest 5*l.* per cent. per annum on all such expenses, to deduct, and retain the said purchase money, interest and all other moneys due under this agreement. As WITNESS, &c."

Here followed the schedule of the advances referred to.

Shortly after this the timber in question was supplied to *Till* and *Wynn* by the plaintiff, who, at first, required a guarantee of some other person, whereupon they offered *Jukes*; but his security was rejected by the plaintiff, and he ultimately supplied the timber on the credit of *Till* and *Wynn* alone.

Joseph Barker, one of the vendors under the above agreement, being called at the trial, stated that, after some advances had been made to the defendants, he objected to

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make any further, unless all three signed the receipts, or unless they would give him a memorandum authorizing him to pay to whichever of them called ; and that thereupon on the 12th *April*, they signed the following :—

“ To Mr. *J. Barker*.

“ *April*, 1862.

“ Sir. We, the undersigned, being partners in a contract for the purchase of land situate in *Oxton Road, Birkenhead*, from you and Mr. *T. Sanders*, which contract is dated the 28th *February*, 1862, and contains stipulations as to advances to be made to enable us to erect buildings thereon, hereby agree that the signature of any one of us shall be an effectual receipt for advances so made, and any such benefit shall be binding upon the whole of us.

“ *John Wynn*.

“ *Joseph Jukes*.

“ *George S. Till*.”

Jukes subsequently purchased the interest of *Till* and *Wynn* in the buildings.

The learned Judge left to the jury to say whether they inferred from the evidence that the statement of *Till* and *Jukes* was incorrect : did they believe that *Jukes* was personally interested in the transaction ?

The jury found for the defendant *Jukes*, leave being reserved to the plaintiff to move to enter a verdict for himself for the amount claimed, on the question whether *Jukes* was in point of law a partner, and liable as such ; the plaintiff undertaking not to take the case to a Court of error.

Aspinall, in *Michaelmas* Term, 1862, obtained a rule nisi accordingly ; and also for a new trial on the ground of misdirection, in that the Judge should have directed the jury that the written documents proved a partnership between

Jukes and the other defendants as regarded the plaintiff, or should have more distinctly pointed out what would be evidence of such a partnership ; and on the ground of the verdict being against the evidence.

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The learned Judge reported himself satisfied with the verdict, and that the jury must be taken to have believed *Jukes* and *Till*, and to have found that the arrangement was as they stated it, and that *Jukes* gave no authority in fact to *Till* and *Wynn* to order timber on his account.

The rule was argued at the Sittings in banc after *Hilary* Term (*February* 12th), before WIGHTMAN, CROMPTON, BLACKBURN and MELLOR JJ. CROMPTON J. left the Court at the conclusion of the argument of the defendant's counsel, and therefore took no part in the judgment.

Mellish and *Robins* shewed cause.—*Jukes* was not a partner with *Till* and *Wynn* in these houses. The real contract between the three defendants inter se was that *Till* and *Wynn* were to furnish all things necessary for the houses, including timber, and *Jukes* was to furnish ironmongery ; so that the timber supplied by the plaintiff did not become partnership property until it was put into the houses. *Gibson v. Lupton* (a) is an authority that if two persons purchase goods they are not both responsible if the intention of all parties was that they should be responsible severally. Here was no holding out of *Jukes* as a partner. [*Blackburn* J. That is not essential. There are many cases where a dormant partner has been held liable, although there was a secret agreement with his partners that he should not be so.]

(a) 9 Bing. 297.

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The reason of that is not apparent, and it has never been so laid down by the House of Lords. [*Wightman J. Jukes* was to have the benefit of this transaction.] That is not the test. The true test of partnership is whether each of the parties has constituted the others his agents for the general object. Moreover, as *Jukes* is not entitled to any of the profits over and above what is sufficient to reimburse him, he is no more a partner than any other creditor who advances money to his debtor thereby becomes his partner. [*Blackburn J. Jukes* differs from an ordinary creditor in this, that he gets a preference over other creditors. Besides, if the houses were burnt down he was to lose all.] Where several persons engage in a joint adventure, and by agreement among them, one is to contribute one thing and another another to the general object, and they do not hold themselves out as partners, they are not partners in it, and cannot be treated as such, although they share the profits of the concern among them; *Saville v. Robertson* (a), *Wilson v. Whitehead* (b), *Cox v. Hickman* (c). The other side may rely on *Gouthwaite v. Duckworth* (d); but the present case does not come within it, and, if it even did, that case is overborne by those already cited.

Heath, in support of the rule.—The agreement of the 28th *February*, 1862, executed by the three defendants, and the subsequent letter signed by them, shew that they were joint speculators in this concern. [*Blackburn J.* No doubt in that agreement they were joint contractors with the owners of the land, but that does not necessarily make them so as regards the plaintiff, who is not acting

(a) 4 *T. R.* 720.

(b) 10 *M. & W.* 503.

(c) 8 *H. L. C.* 268.

(d) 12 *East*, 421.

in any way on that agreement.] *Vere v. Ashby* (a) shews that he is entitled to take advantage of it. Participation in profits constitutes partnership; *Gouthwaite v. Duckworth* (b), *Gilpin v. Enderbey*, in error (c), *Fereday v. Wightwick* (d), *Curling v. Robertson* (e), *Barry v. Nesham* (f): and that principle is not impugned by *Cox v. Hickman* (g), which depended on its own special circumstances; and, as to *Wilson v. Whitehead* (h), it was not much argued.

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Cur. adv. vult.

The Judges, differing in opinion, the following judgments were now delivered.

MELLOR J. The question in this case was, whether the defendant *Jukes* was jointly liable with the two other defendants, *Till* and *Wynn*, in respect of certain timber supplied by the plaintiff upon the orders and on the credit of *Till* and *Wynn*, for the purpose of erecting certain houses at *Birkenhead*, which all the defendants had contracted with Messrs. *Sanders & Barker* to build upon a piece of land purchased of them.

It appeared that *Till* and *Wynn* being indebted to *Jukes*, who was an ironmonger, for ironmongery goods previously supplied by him to them, proposed to him that he should join them in the purchase of a piece of land, that they (*Till* and *Wynn*) should build certain houses upon it, and that he should supply the ironmongery, and they the other materials required in the building of the houses; and that out of the profits expected to arise therefrom he should be paid his exist-

(a) 10 B. & C. 288.

(c) 5 B. & A. 954.

(e) 7 Man. & Gr. 336.

(g) 8 H. L. C. 268.

(b) 12 East, 421.

(d) 1 Russ. & My. 45.

(f) 3 C. B. 641.

(h) 10 M. & W. 503.

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ing debt of 189l., as well as the price of the ironmongery to be supplied by him for the houses; but that any surplus of profit after satisfying those claims *should exclusively belong to Till and Wynn*; and that in the event of no profit arising, *Jukes* should forego his debt and the value of the ironmongery so to be supplied. The plaintiff, at the time he supplied the timber for the houses, was not aware that *Jukes* was interested in the building, or connected with *Till* and *Wynn* in the speculation; but the timber was supplied by the plaintiff on the credit of *Till* and *Wynn* alone.

Under these circumstances, to entitle the plaintiff to recover against *Jukes*, he must make out that the relation between these three defendants, arising out of their joint contract to build the houses, amounted to an actual partnership, so as to confer on each joint contractor an authority to bind the others in respect of all orders given in furtherance of the object of the contract; or he must shew that *Jukes* actually authorized the order given by the other defendants to the plaintiff to supply the goods in question. Unless he succeeds in establishing one or other of these propositions, his rule must be discharged. It is not contended that *Jukes* expressly sanctioned the order for the goods on his own behalf; on the contrary, the agreement between the defendants, inter se, was that *Jukes* was to supply the ironmongery, and that the other defendants were to provide all other materials. The plaintiff must, therefore, rest his case upon an implication of authority to each of the defendants to bind the others for all goods supplied, or work done, in the building of the houses, in pursuance of the contract with Messrs. *Sanders & Barker*; and this quite independently of any arrangement between themselves as to the scope and object of the speculation itself.

I am of opinion, that under the circumstances of this case, there was not any implication of authority to the other defendants to bind *Jukes* by the order given by them for the timber in question. So far as the contract with Messrs. *Sanders & Barker* is concerned, that might have been performed without the defendants giving a single order for goods or materials to be supplied to the building, by simply making a separate contract with a builder to erect the houses. In one sense, the goods or materials used in the building would have been supplied for the benefit of the defendants jointly; but it cannot be contended that they would have been liable to the parties who furnished the materials on the credit of the contractors. It appears to me that *Jukes* derived no other kind of benefit from the contracts of *Till* and *Wynn* than the three defendants would have derived from employing an independent contractor. The order given to the plaintiff was not given by persons acting, or professing to act, on behalf of *Jukes*, but by persons in fact acting, and professing to act, on their own behalf, and was, in fact, given in order that they might perform their part of the arrangement with *Jukes* for providing the portion of the materials which they had agreed to supply towards the building of the houses.

The decisions of the Courts with reference to this branch of the law have not been uniform; but, since the case of *Cox v. Hickman* (a), reported elsewhere under the name of *Wheatcroft v. Hickman* (b), I think that the principle applicable to the facts of the present case is sufficiently clear to determine the result in favour of the defendant *Jukes*. In *Cox v. Hickman* (a) Lord *Cranworth*, in his judgment, thus

(a) 8 H. L. C. 268.

(b) 9 C. B. N. S. 47.

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expresses the rule of law, p. 306:—"It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such claim. *But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf.*" And Lord Wensleydale, in the same case, says, p. 312-313:—"A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer." And again, in referring to the terms of the deed in that case, he says, p. 313:—"Can we collect from the trust deed that each of the subscribing creditors is a partner with the trustees and by the mere signature of the deed constitutes them his agents for carrying on the business on account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; *for if it is profitable, they may get their debts paid; but this is not that sharing of profits which constitutes*

the relation of principal, agent, and partner." In the present case, by joining *Till* and *Wynn* in the contract with *Sanders & Barker*, *Jukes* might obtain the payment of his old debt, and of the price of the goods to be supplied by him; but this is not, as I think, such a "sharing of profits" as "constitutes the relation of principal, agent, and partner." In other words, the order to the plaintiff was not given by persons acting in that transaction for or on behalf of the defendant *Jukes*, but by persons acting, and professing to act, on their own behalf.

I think, therefore, that the rule for entering the verdict against *Jukes* must be discharged.

BLACKBURN J. In this case, which was tried before my brother *Willes* at *Liverpool*, the verdict was for the defendant *Jukes*, subject to the leave reserved.

A rule was obtained to set aside the verdict for the defendant and to enter the verdict for the plaintiff for 133*l.* 2*s.* 10*d.*, or for a new trial, on the ground of misdirection, or as against evidence. This rule came on for argument, in the Sittings after last Term, before my brothers *Wightman*, *Crompton*, *Mellor* and myself. My brother *Crompton* was obliged to leave the Court before the completion of the argument, and consequently does not take any part in this judgment.

The action was against *Jukes*, *Till* and *Wynn* for goods sold and delivered. *Till* and *Wynn* allowed judgment to go by default; *Jukes* pleaded never indebted, on which issue was joined. On the trial, before my brother *Willes*, it appeared in evidence that in *March*, 1862, the plaintiff was applied to by *Till* and *Wynn*, who were then engaged in erecting some buildings at

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Birkenhead, to supply them with timber, *Jukes* as their surety; the plaintiff as a surety. Ultimately however, the timber to *Till* and *Wynn* on the time supposing that *Jukes* had any. His case at the trial was that *J* partner with *Till* and *Wynn* in the timber, the plaintiff, not having known he gave credit to *Till* and *Wynn*, and against the defendant *Jukes* jointly as partners. And it was not disputed in law, the only question made being whether *J* partner with the two other defendants or interested in it to such an extent as to be liable to the plaintiff. The plaintiff's declaration, 28th February, 1862, very shortly stated that of the timber, *Jukes*, *Till* and *Wynn* had entered into an agreement in writing with Messrs. *Sanderson* for the purchase by *the three* of a plot of land, *the three* binding themselves to carry out the plan according to a specified plan and the vendors agreeing to make arrangements to enable them to complete those buildings. The plaintiff agreed that the conveyance of the land was paid, was to be to *the three*. The buildings of which this action was brought were used for the erection of those buildings.

There could be no doubt that *J* was himself to the vendors, Messrs. *Sanderson*, for the erection of these buildings to be erected; and that the vendors, he was a principal partner with *Wynn*; but the plaintiff was no partner

and at the time of the supply was ignorant of its existence, so that, as between the plaintiff and *Jukes*, the agreement formed evidence that *Jukes* was a principal in the erection of the buildings, but was evidence only, and open to explanation.

The defendants *Jukes* and *Till* were called as witnesses for the defence. They stated that *Till* and *Wynn* were engaged in building speculations in which *Jukes* had no interest, but that he had lent them various sums of money, amounting, in *January*, 1862, to 189*l.*; that he had refused to make them any further advances, and was pressing them for repayment. It was, according to their evidence, then agreed between them that the three should join in taking a piece of land in their joint names; that *Till* and *Wynn* should erect the buildings on it themselves, *Jukes*, who was an ironmonger, supplying them with the ironmongery; and it was further agreed that *Jukes* should have an interest in the houses to this extent, that he should be paid out of their proceeds the amount of his old loan of 189*l.*, and the price of what ironmongery he was to supply—about 250*l.*,—but no more. It was distinctly sworn that the agreement was, that any surplus was to be *Till* and *Wynn*'s, *Jukes* being only to take out the amount of his loan and the ironmongery; but if the proceeds proved insufficient to pay that, *Jukes* was to be a loser.

On this evidence the case was left to the jury, who found for the defendant. The learned Judge is satisfied with their verdict, and reports that the jury must be taken to have believed *Jukes* and *Till*, and to have found that the arrangement was as they stated it, and that *Jukes* gave no authority, in fact, to *Till* and

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the question, whether the defendant *Jukes* was, in point
of law, a partner, and, as such, liable.

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I have come to the conclusion that, on these findings, the defendant *Jukes* was not liable for the goods purchased by *Till* and *Wynn*.

I think that there was evidence that the three were jointly engaged in erecting the buildings, which would have supported a verdict for the plaintiff. The undisputed fact that *Jukes* had bound himself to the vendors that the buildings should be erected shewed that he had an interest in causing them to be erected, and rendered it probable that he would join in doing so. But that fact alone is quite consistent with his being no party to the contracts for purchasing the materials, or paying the workmen engaged. The whole three, *Jukes*, *Till* and *Wynn*, might have made a contract with a fourth person that he should erect the buildings; and though they would thus have caused the contractor to erect them for their benefit, it would be impossible to say that they would have made themselves liable to the tradespeople or workmen employed by that contractor. And if *Jukes*, in fact, *bonâ fide* made a similar arrangement with *Till* and *Wynn*, by which he put them in the position of the contractor, I think there is nothing in point of law to prevent him, unless the interest which he reserved to himself in the houses constituted him a partner, at least as to third persons; and that, I think, is the question reserved. Now, according to the defendants' own evidence, he did reserve to himself some interest in the transaction. He was to supply part of the materials, the ironmongery, not as selling it to *Till* and *Wynn*, but on the terms that the price of that ironmongery, and

his original debt should be paid for out of the proceeds of the buildings; and he had made himself a party to the contract for the purchase of the building land, so as to secure to himself a hold over the land to secure this lien. But I do not think that this is such an interest in the profits of the building transaction as, (at least since the late decision of the House of Lords in *Cox v. Hickman* (a)), to make him a partner in it. It is not an unusual thing for a merchant to advance money and furnish supplies to the captain of a ship on the terms that he shall have a bottomry bond, giving much such a beneficial interest in the ship and freight as this arrangement gave *Jukes* in the buildings, yet I think no one would say that the merchant was liable as a partner with the captain to those who furnished the rest of the outfit on the captain's credit. It is true that the supposed case is one in the usual course of trade, whilst such a transaction as the present is rather out of the ordinary course of business; and that there always is a possibility that a person who is really a partner may endeavour to cloak his interest by an apparent arrangement of this sort. These were fair topics for the consideration of the jury, and were no doubt urged upon them by the counsel for the plaintiff; but the jury have found that in fact the evidence given for the defence was true, and that *Jukes* did not in fact give authority to *Till* and *Wynn* to buy timber for him; and the learned Judge who tried the cause is satisfied with the finding.

Several cases were cited on the argument, but the principal discussion was very properly on the recent case of *Cox v. Hickman* (a); for not only was the whole subject there very much discussed, but the decision being in

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the House of Lords, it supersedes all earlier authorities inconsistent with that decision, and, as far as the judgment goes, is binding on all inferior tribunals.

In that case there was a deed of composition, by which it was arranged that the business of *The Stanton Iron Company* should be carried on by trustees, for the purpose of paying the creditors, and to some extent under their control; and the point decided was that the terms of the particular deed were not such as to make the creditors who had executed it liable for the trade debts of *The Stanton Iron Company*. No doubt, therefore, the case was peculiar in its circumstances; but still I think that we can collect from the judgment of the House principles sufficient to shew that in the present case the arrangement found by the jury to be the true one, did not, as a matter of law, constitute a partnership. Lord *Cranworth*, in his judgment, says, p. 304:—
“The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public

have a right to assume that every partner has authority from his copartners to bind the whole firm in contracts made according to the ordinary usages of trade." He then proceeds to consider the great question in that case, viz., whether the terms of the deed under which the business of *The Stanton Iron Company* was carried on were such as to make the creditors who had executed it partners as to those dealing with that firm. He says, p. 306:—"It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, *that the trade has been carried on by persons acting on his behalf*. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them.' It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say, that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

The jury have in the present case found that the defendant *Jukes* did not, in fact, intend to give authority

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to *Till* and *Wynn* to order the timber for him ; and the question, according to the passage I have just quoted from *Lord Cranworth's* judgment is, not simply whether *Jukes* had an interest in the profits of the trade, but whether he had such an interest in them as to make the trade be carried on on his behalf, so that he stood in the relation of principal towards *Till* and *Wynn* who incurred this liability.

Lord Cranworth afterwards (pp. 306-7) uses language very applicable to the present case. He says, "The debtor" (in this case *Till* and *Wynn*) "is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors." Taking this to be the law, and it was so necessary for the decision in *Cox v. Hickman* (a) that I think it must be considered as the decision of the House of Lords, it certainly seems to me to follow, that the arrangement which the jury have found to have really existed between *Jukes* and *Till* and *Wynn*, did not make *Jukes* liable to the plaintiff on the contract which the other two made for the purchase of the timber. It is not necessary in this case to consider how far the older cases are overruled by the decision in *Cox v. Hickman*, for it seems to go far enough, at least, to decide this case.

The rule was obtained on the ground of misdirection, but that was merely as a precaution in case the point intended to be reserved was not sufficiently raised. It seems to me that the case was one fit to leave to the jury, and was properly left to them, and that their verdict ought not to be disturbed.

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BLACKBURN J. then read the judgment of

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WIGHTMAN J. This was an action by the plaintiff against the defendant *Jukes* and two other persons, named *Till* and *Wynn*, for goods sold and delivered; and the question is, whether *Jukes* was liable jointly with *Till* and *Wynn* as a partner in the transaction in respect of which the goods (timber) had been supplied by the plaintiff.

It appeared upon the trial that *Till* and *Wynn* were jointly engaged in building houses, and that *Jukes*, who was an ironmonger, had supplied them with ironmongery, and that they were indebted to him in 1891. There being a difficulty in the payment of this debt, it was proposed by *Till* and *Wynn*, and agreed to by *Jukes*, that the three (*Till*, *Wynn* and *Jukes*) should purchase a piece of land, and that *Till* and *Wynn* should build houses upon it, and that *Jukes* should furnish the ironmongery for the houses and nothing else, and that he should be paid his old debt, and also for the ironmongery supplied in the building, and any money he might advance, out of the sale of the houses when built, and that all the profits beyond what would pay *Jukes* should belong to *Till* and *Wynn*; and that if the speculation wholly failed, *Jukes* was to lose his old and new debt and any advance he might make. In pursuance of this arrangement, *Till*, *Wynn* and *Jukes* entered into a joint agreement with Messrs. *Sanders & Barker* for the purchase of a piece of land for building, and the three agreed jointly with the vendors that they would build three dwelling-houses and shops fit for habitation within four months from the date of the agreement, and afterwards seven other dwelling-houses. The agreement also contained

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provisions for payment of the price of the building by *Wynn* and *Jukes*, and also for advance of the money if required by the purchasers (*Till* and *Wynn*) for the amount of 550*L.*, to enable them to complete the building. There are other provisions between *Till* and *Wynn* three jointly relating to the underwriting of the agreement the building was to be built. The plaintiff was applied to by *Till* and *Wynn* for timber (the price of which was the subject of the present action), and which was used for the building of the houses. When they applied to the plaintiff to supply the timber they proposed to use, the plaintiff, who knew nothing of their arrangements, did not give any guarantee, and seems to have sold the timber on the credit of *Till* and *Wynn*. Subsequently it appeared that *Jukes* had an interest in the building of *Till* and *Wynn*, and brought the case before the court. The question is, whether *Jukes* had any interest in the transaction as well as *Till* and *Wynn* jointly with them.

I am of opinion that the three defendants are liable to the plaintiff in this action for the timber supplied by the plaintiff upon the application of the defendants only, and upon the timber being used by them for the performance of the contract executed by them jointly with *Jukes* for the building of their benefit. It is true that, as between *Till* and *Wynn* and *Jukes*, *Till* and *Wynn* were to do the work, but *Jukes* was bound to do it as they were. In order to fulfil a contract which *Till* and *Wynn* were bound to perform. *Jukes* knew that the timber was required for building the houses, and

ments between him and *Till* and *Wynn*, they were to supply it, it was for his benefit as much as theirs that it should be supplied, in order to fulfil the contract that he had jointly with them entered into with the vendors of the land. The timber must be had or his and their contract with the vendors could not be performed; and, in ordering and obtaining the necessary supply, it seems to me that *Till* and *Wynn* were acting, as far as regards third persons, not merely for themselves, but as agents for *Jukes*, who was as much bound to obtain timber to fulfil their joint contract as they were. *Jukes*, by contracting with the vendors of the land jointly with *Till* and *Wynn*, was no longer a free agent as respected that contract; he was jointly bound with them to the performance of it; and whatever was necessary for its performance, if ordered by them with his knowledge and assent, as was the case in the present instance, must, I think, be considered as ordered by his authority; and that as far as respected third persons, ignorant of their private arrangements between themselves, he was a partner with them, and liable as such. My opinion is founded upon the peculiar circumstances of this case, and mainly upon the effect of the contract with the vendors of the land.

The cases cited upon the argument appear to me distinguishable from this, and especially the case of *Cox v. Hickman* (a), the circumstances of which were so peculiar that the decision in that case is hardly applicable to the circumstances of this. The case of *Wilson v. Whitehead* (b) appears to me to be of very questionable authority. The Court gives no reasons for refusing the rule except such

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as may be collected from observations in the course of the argument of the counsel who moved unsuccessfully for a rule. From them it may be collected that the Court was much influenced by a supposed analogy between the case before them and that of stage-coach proprietors where each horses the coach with his own horses for one or more stages, in which case the proprietors of the coach are not jointly liable for provender supplied to the horses of each, as decided in *Barton v. Hanson* (a); an analogy quite inapplicable to the present case, and, as it seems to me, to the case then before the Court. The case of *Barry v. Nesham* (b), as far as it goes, is in favour of the plaintiff in the present case; but the nearest case to the present of any that was cited is that of *Gouthwaite v. Duckworth* (c). The circumstances of that case are in many respects similar to those in the present, and the remarks of Lord *Ellenborough* in his judgment are very applicable to this case.

Upon the whole, I am of opinion that *Jukes* was a partner with the other defendants in building the houses; that the timber was supplied by the plaintiff for the partnership use and benefit; and that the defendant *Jukes* is liable jointly with the others, and that the verdict should be entered against them all for 133*l.* 2*s.* 10*d.*

Rule discharged.

(a) 2 *Taunt.* 49.

(b) 3 *C. B.* 641.

(c) 12 *East*, 421.

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OPPENHEIM and others *against* FRY.Monday,
May 4th.

1. In a policy of insurance upon a steamer, in the ordinary form, the hull and the machinery were separately valued, with a clause, "average payable on the whole or on each as if separately insured." The steamer had discharged her cargo at C., and while she lay there without any cargo on board her hull was damaged by fire. The cost of repairs to the hull amounted, after a deduction of the usual one-third, to 380*l.* 12*s.* 6*d.*, including the sum of 9*l.* 0*s.* 1*d.* for *Lloyd's* surveyors' fees. An additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common 3 per cent. memorandum. Held, in an action for particular average on the hull; per *Cockburn C. J.* and *Crompton J.*; that, assuming these expenses to be particular and not general average, they must be apportioned to the hull and machinery according to their respective values, and that only the sum due for the hull could be added to the direct loss on the hull.
2. Per *Blackburn J.* The parties must be understood to have agreed that any expenditure incurred entirely and exclusively for saving the whole subject of insurance, should, for the purpose of adjusting the loss on the policy, be treated as general average.
3. *Semble*, per *Blackburn J.* Where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested.

Marine insurance. General and particular average. Common 3 per cent. memorandum. Steamer. Hull and machinery separately valued.

DECLARATION on a policy of insurance, in the form used at *Lloyd's*, "for the space of twelve calendar months at and from the 24th day of *November*, 1859, to the 23rd day of *November*, 1860, both days inclusive, at all times and in all places," upon the ship or vessel called *The Baroness Tecco* steamer, "valued at

"£14,000 on the hull of the said steamer	} £22,000
8000 on the machinery of the same	

£17,650. Average payable on the whole or on each as if separately insured." The perils insured against were the usual perils; and there was the common memorandum "warranted free from average under three pounds per cent., unless general, or the ship be stranded." The declaration averred that, during the twelve calendar months, and whilst the ship was at the port of *Constantinople*, and was protected by the policy, she was, by

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fire and by perils of the seas, injured and damaged to an extent exceeding 3*l*. per cent. within the meaning of the policy.

Plea. That the ship was not, by fire or perils of the seas, injured or damaged to an extent amounting to or exceeding 3*l*. per cent. within the meaning of the policy.

Issue thereon.

The plaintiffs delivered the following particulars of demand.

"The plaintiffs in this action claim as for particular average an amount exceeding three per cent. on the insured value of the hull: they claim no general average or particular charges in respect of the hull. They make no claim as for general or particular average or particular charges in respect of the machinery; but there is a sum allocated by the average stater to general average in the statement prepared by Messrs. *Gray & Heintz*, dated 29th *May*, 1861, a copy of which is in the hands of the defendant, which the plaintiffs say is particular and not general average."

On the trial, before *Cockburn C. J.*, at the *London* Sittings after *Trinity* Term, 1862, it appeared that, after the policy attached, and while the risk continued, the steamer discharged her cargo in the port of *Constantinople*, and lay there empty without any cargo on board, when a fire, being one of the perils insured against, caught her. For the purpose of extinguishing it extra hands were employed besides the crew, and expenses were incurred. With such additional help the fire was extinguished, after damaging the steamer, but not the machinery. In consequence of this fire a survey of the ship was made by *Lloyd's* surveyors, and the damage sustained by the fire was repaired at *Constantinople*. The cost of repairs to the hull, owing to the

damage, amounted, after the deduction of the usual one-third, to 386*l.* 12*s.* 6*d.*, including 9*l.* 0*s.* 1*d.* for *Lloyd's* surveyors' fees. In addition to the 386*l.* 12*s.* 6*d.*, the sum of 55*l.* 5*s.* 10*d.* was expended for labourers, pumps and other assistance in extinguishing the fire. Prior to the action being brought an average statement was prepared by Messrs. *Gray & Heintz*, as average staters, on behalf of the assured, which was admitted for the purposes of the action to be a faithful summary of the shipmaster's disbursements on account of the damage, reduced into *British* money, and to contain a proper analysis of the accounts with a view to the several liabilities of the parties concerned. But it was mutually provided that this admission was to be without prejudice to any question the plaintiffs might be advised to raise as to the sum of 9002 piastres for labourers and pumps in extinguishing the fire being properly appropriated. This sum included the 55*l.* 5*s.* 10*d.*, and consisted of several items headed "Sundry expenses incurred on board the ship on the night of the fire to preserve her from total destruction." Among the items was "*Lloyd's* agent and surveyors' fees:" at the foot was written

" Allow to general average -	-	7741
„ particular -	-	1261
		<hr/>
		p. 9002."

The result was stated as follows :

" Account of particular average—not 3 per cent. on 14,000*l.* the insured value of hull. No claim."

" Amount of general average which falls upon the ship, the vessel being in ballast and unchartered, is upon the 22,000*l.*, the insured value, 5*l.* 7*s.* per cent."

Mr. *Gray*, one of the plaintiffs' average staters, was called by the defendant, and gave the following evidence,

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1863. the admissibility of which was objected to by the plaintiffs.
OPPENHEIM That he divided the sum of 9002 piastres thus, 7741 to
v. general average and 1261 to particular average : that the
FRY. item of 1261 piastres was composed of the surveyors' fees
and a portion of *Lloyd's* agent's fees : that, according to
the ordinary practice of average staters in determining
whether the particular average on the ship amounted to
3 per cent., he did not include the sum allowed for sur-
veyors' fees and *Lloyd's* agent : that the universal prac-
tice was that the 3 per cent. must be the net repairs,
independent of any extra charges, and must relate to
the repairs alone : that, in determining what was
general average in reference to this memorandum, it
made no difference, supposing there was a cargo on
board the ship, whether the same person owned the ship
and cargo, or whether one person owned the ship and
another the cargo : that if the ship was in ballast and
there were expenses which were in the nature of general
average, he should treat them as general : that when
losses in the nature of general average happened in
cases either where one person owned both ship and
cargo or where the ship was in ballast, the underwriters
were in the habit of paying those losses, although they
were less than 3 per cent., and, although there was only
one person interested in the whole subject : that where,
as in this policy, there was an insurance covering the
whole, but the hull and machinery were insured in
separate sums, and expenses were incurred in the nature of
general average, he would divide those expenses between
the hull and machinery, treating it as a case of general
average, and apportioning a sum to each as general average,
though there would be no apportionment on account of
the owner of the hull and machinery being the same
person : that it would make no difference whether the

owner of the hull and machinery was the same or a different person : and that the average statement which he had made in this case was in accordance with general practice and usage. He stated on cross-examination that he did not recollect any particular instance where there had been a fire such as this affecting the insurance on a vessel so insured ; but that he remembered several instances of his being called upon to state the average, where there was only one interest, where a ship in ballast had lost an anchor and cable ; and he charged the underwriters as general average, although the loss did not amount to 3 per cent., and the underwriters had paid according to his statement ; that if it amounted to or exceeded 3 per cent., the underwriters would be liable for general average. And that, in the case of steamers, it was almost the universal practice to insure by such a policy as this.

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It was contended for the plaintiffs that, the insurance on the hull being 14,000*l.*, in order to establish a loss to the amount of 3 per cent. they need only make out one of 420*l.* ; and consequently that the amount of the loss, including the expenditure for labour &c. in putting out the fire and *Lloyd's* agent and surveyors' fees, being 441*l.* 18*s.* 4*d.*, they were entitled to recover.

The defendant relied upon the words in the common memorandum "warranted free from average under three pounds per cent., unless general ;" and contended that the expenditure in question, amounting to 55*l.* 5*s.* 10*d.*, and *Lloyd's* agent and surveyors' fees, amounting to 9*l.* 0*s.* 1*d.*, were in the nature of general average, and therefore were not to be included, which would reduce the loss to 377*l.* 12*s.* 5*d.*, that is, below 3 per cent. He also contended that if the 55*l.* 5*s.* 10*d.* and 9*l.* 0*s.* 1*d.* were particular average, they were to be apportioned to

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the hull and the machinery ; and that if the proportions of those sums, that of the former being 35*l.* 3*s.* 9*d.*, were added, the loss would still be below 3 per cent.

The Lord Chief Justice directed the jury to find a verdict for the defendant, and reserved leave to the plaintiffs to move on the several points that had arisen at the trial, it being agreed that the evidence given on the part of the defendant should be dealt with by the Court according as they should think it admissible or not.

In *Michaelmas* Term,

Edward James obtained a rule nisi accordingly, to enter a verdict for the plaintiffs on the ground of misdirection of the Lord Chief Justice in ruling that the expenditure in question was in the nature of general average, and ought not to be added to the particular average loss, and on the ground of the erroneous admission of the above evidence in contradiction of the terms of the written contract.

No counsel appeared to shew cause.

Edward James and *Maclachlan* supported the rule.— This is a case of particular average loss. General average is not possible except where a plurality of subjects of insurance are exposed to the same danger, or where expenses have been incurred, or a loss sustained, for the benefit of divers owners. In the present case there is only one subject-matter—the steamer ; the machinery, no more than the boats and tackle, can be separated from the hull. But the parties have contracted that, in order to have the benefit of average on each, the hull and the machinery shall be considered separate. The damage was only to the hull, and the expenditure necessary to put out the fire forms part of the particular average ;

and this, being added to the damage to the hull, raises the loss to more than 3l. per cent.

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Particular average loss is not confined to damage sustained by the subject of insurance, but includes extraordinary expenditure of money necessarily incurred for the purpose of arresting the injurious effects of the perils insured against, and for the benefit of some particular interest; 2 *Arnould on Insurance*, p. 970, ch. v., s. 1, § 358, 2d ed.; *The Great Indian Peninsula Railway Company v. Saunders* (a), *Job v. Langton* (b), *Moran v. Jones* (c). With this agree foreign jurists and foreign law; *Pothier, Contrat d'Assurance*, No. 112. 161; *Émérigon, Traité des Assurances*, par *Boulay-Paty*, 1827, tom. 1, ch. xii., s. 39, p. 585; *Boulay-Paty, Droit Commercial Maritime*, 1834, tom. 4, pp. 478. 481; *Ordonnance de la Marine*, liv. 3, tit. 7, art. 2, with the *Commentaire de Valin*, vol. 2, p. 164; *Code de Commerce*, art. 403. In opposition to this the *London and Liverpool* average adjusters consider that particular average is confined to the deterioration of the subject of insurance, as is stated in *Benécke on Marine Insurance*, p. 472, and consequently all expenditure beyond what is necessary to reinstate the thing insured in its former condition is allotted by them to what they call particular charges; and these charges, when such as they recommend the underwriter to pay, are said to be in the nature of general average. *Erle C. J.*, in *The Great Indian Peninsula Railway Company v. Saunders*, in error (d), says:—"It is agreed that 'particular average' has two meanings, universally understood—that when taken with reference to the common memorandum clause it excludes certain expenses, but when taken with reference to the money to

(a) 1 B. & S. 41, 52.

(b) 6 E. & B. 779.

(c) 7 E. & B. 523.

(d) 2 B. & S. 266. 274.

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be paid by the underwriter it includes them." There is, however, no commercial usage which gives to the term "particular average" two different meanings in *Lloyd's* policy. The usage at *Lloyd's* is misunderstood by the average staters: it must have been this:—to add expenditure and damage, and if, together, they were under 3*l.* per cent., then to pay the expenditure voluntarily as the underwriters had, by the expenditure, been relieved from further liability. A very strong argument in favour of this view of the usage at *Lloyd's* is to be found in the alarm created by the introduction of these exceptional memorandums; 2 *Valin, Commentaire sur l'Ordonnance de la Marine*, p. 113. From very early times average under one per cent. was not recoverable; yet the only foreign authorities which refer to what is to be included or excluded in estimating the 1*l.* per cent. are the following. *Boulay-Paty, Droit Commercial Maritime*, 1834, tom. 4, p. 510; and all that he says is:—"Les frais de réclamation ne peuvent être compris dans le calcul de l'avarie, afin d'en grossir le montant pour qu'il excède un pour cent. La loi veut qu'on ne puisse former d'action en avarie, si l'avarie n'excède un pour cent par elle-même. Les assureurs ne répondent de rien ubi damnum non excedat unum pro centum, dit *Kuricke, diatr. de assur.*, n°. 8."

Sir *George Honyman* then appeared for the defendant, but was not called upon.

COCKBURN C. J. I am of opinion that the rule must be discharged. I am disposed to think that this is general and not particular average; but it is unnecessary to decide that question, because, assuming that it is particular average, the case here is the same as if there

were two policies, one upon the hull and one upon the machinery; and the whole of the damage having been to the hull, that does not come up to the 3*l.* per cent. so as to entitle the assured to recover on the insurance of the hull.

But the plaintiffs pray in aid the extra expenditure incurred on the occasion of the fire, consisting of two items, viz. 55*l.* 5*s.* 10*d.*, in putting out the fire, and 9*l.* 0*s.* 1*d.*, the costs of necessary surveys held on board the vessel after it had been extinguished. With regard to the 55*l.* 5*s.* 10*d.*, the proportion of that which is due to the hull is admitted to be 35*l.* 3*s.* 9*d.*; and I am of opinion that that proportion is all that can be properly appropriated to the hull. Granting that an extraordinary expenditure may be treated as particular average, this expenditure was incurred for the benefit, not of the hull only, but of the entire vessel, consisting of the ship and her machinery, which is as much part of the ship as the masts and rigging. Therefore, when considering how much partial loss has occurred to the hull and how much consequently would come under the head of particular average, we can only allot to the hull such a proportion as its value bears to the value of the whole, viz. 35*l.* 3*s.* 9*d.*; and that will not raise the loss to 3*l.* per cent.

Then the plaintiffs pray in aid 9*l.* 0*s.* 1*d.*, the expenses of survey. Granting that the expenses of a survey are necessary to ascertain the seaworthiness of a vessel and her fitness to go to sea, with regard to the safety of the crew and of the vessel, and granting that those expenses can be brought under the head of particular average, the same principle applies. The survey being necessary for the safety of the whole, in considering how much is particular average as applicable to the hull, the 9*l.* 0*s.* 1*d.* cannot be applied wholly to it, but must be distributed

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according to the proportionate value of the two parts. When that is done the loss does not rise to the 3*l*. per cent. and consequently upon this average clause in the contract between the parties the plaintiffs fail.

The verdict for the defendant was therefore right.

CROMPTON J. I also think that the verdict for the defendant was right. This is a peculiarly worded policy; but we can decide the case without going into the difficult questions as to what extraordinary expenses are to be put to general or to particular average, because the contract between the parties is clear. They choose to make this stipulation, "17,650*l*. Average payable on the whole or on each as if separately insured." Under this stipulation the assured have a right to look on the subject of insurance, viz., the hull and the machinery, as a whole, or at each part separately, as they like. If they look on it as a whole, and take into account the entire damage, it is conceded that the loss which has happened will not come up to 3*l*. per cent. upon the value. And the object of this stipulation is that, as there may be an injury to a part only, the assured may divide the subject of insurance and so compare the loss, not with the whole 17,650*l*., but with the 14,000*l*. or the 8,000*l*., according as the injury is to the hull or to the machinery. Then the plaintiffs can only recover by settling the average on the footing of the loss being a partial loss of 3*l*. per cent. on the hull only, and not on the hull and machinery. The direct partial loss on the hull is not 3*l*. per cent.; therefore, unless the plaintiffs can add a sum sufficient to make it up to 3*l*. per cent., they are not entitled to recover. They try to do that, first by adding 55*l*. 5*s*. 10*d*., the expense of putting out the fire; but that expense being for the benefit of the

whole, ought to be apportioned. Whether it be called particular or general average is not material, though, it being an expense for the benefit of the whole ship including the machinery, it looks very much like general average, just as when the subject of insurance is a ship and goods: but treating it as particular average, it would be a partial loss on the whole ship, and then it must be compared with the value of the whole; whereas the plaintiffs take the sum of 14,000*l.* the value of the hull, and compare with it the damage to the hull and the loss on the whole. On the other side the underwriters apply the loss partly to the 14,000*l.*, the value of the hull, and partly to the 8,000*l.*, the value of the machinery. And if it is to be applied at all to part, it is clear that it must be by taking only a fair proportion of it.

The other sum which the plaintiffs try to bring in, if allowed at all, is also to be allowed as an expense incurred with reference to the general safety of the ship and adventure, because it was not paid in order to ascertain whether it was for the hull's safety to go to sea, but whether it was fit for the whole ship to go. And, apportioning it in the same way as the former sum, the loss upon the hull still falls under 3*l.* per cent.

BLACKBURN J. Under this policy the parties agree to enter into an insurance upon the hull and machinery of a steamer, valuing the hull at 14,000*l.* and the machinery at 8000*l.* The underwriters underwrite 17,650*l.*, and then comes the stipulation "Average payable on the whole or on each as if separately insured." There is also the ordinary memorandum that "the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded." The meaning of the contract I understand to be this: the

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assurance is on one sum upon the whole, but the parties agree that, for all purposes of average, it shall be considered as if the 14,000*l.* upon the hull was insured in one policy, and the 8000*l.* upon the machinery in another policy, and by another set of underwriters. Then comes the question, what is the effect of that on the ordinary memorandum? I think it is not necessary, for the decision of this case, to say whether the extraordinary expenditure was general average or not, though I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average; whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested, as they might be in the case of a steamer, one in the hull and another in the machinery. But in construing this policy, in which the parties have agreed that the hull and machinery shall, for the purpose of average, be treated as if they were separate subjects of insurance, and as if they were separately insured, they must be understood to have also agreed that any expenditure incurred entirely and exclusively for saving the whole subject of insurance should, for the purpose of adjusting the loss on this policy, be treated as general average, whether, strictly speaking, it be general or particular average. That being so, no part of the 55*l.* 5*s.* 10*d.* should, in my opinion, be treated as particular average loss upon the hull alone, and be added to the actual loss in order to swell the amount of the loss to 3*l.* per cent. so as to entitle the plaintiffs to recover upon the policy.

It becomes therefore unnecessary for me to enter into the consideration of the sum of 9*l.* 0*s.* 1*d.* for the survey; although I am inclined to agree with my brother *Crompton* that the whole of it could not be charged against the hull.

Rule discharged.

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The QUEEN against The Overseers of HINCKLEY. *Saturday, April 25th.*

1. This Court has jurisdiction to review the decision of a Court of Quarter Sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable. *Jurisdiction. Quarter Sessions.*
2. On a question of derivative settlement, it was alleged that the grandfather of the pauper had been bound as parish apprentice sixty-nine years before. In order to prove the indenture of apprenticeship executed by the parish officers, it was shewn that ineffectual search for it had been made among the papers of the pauper. Held sufficient to render secondary evidence receivable, although no search had been made among the papers of the master: per *Blackburn* and *Mellor JJ.*; dubitante *Crompton J.* *Secondary evidence. Search for document. Parish apprentice.*

TWO justices for the borough of *Leicester* made an order under stat. 16 & 17 *Vict. c. 97.*, adjudging *Thomas Walton*, a pauper lunatic, to be legally settled in the parish of *Hinckley*, and ordering the guardians of the *Hinckley* Union to pay the sums of money in that order mentioned for and on account of the churchwardens and overseers of the poor of the parish of *Hinckley*.

On appeal to the Quarter Sessions for the county of *Leicester*, in *April*, 1861, the Court confirmed the order, subject to the opinion of this Court on the following case.

Thomas Walton, the pauper, aged eight years, or thereabouts, is son of *Thomas Walton*, of the borough of *Leicester*, framework knitter. *Thomas Walton*, the father, has not gained a settlement in his own right in any parish, but has a derivative settlement in the parish of *Hinckley* from his father, *Samuel Walton*, who died in *Leicester* in *March*, 1858. *Samuel Walton*, when of

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the age of fourteen years or thereabouts, was bound apprentice by indenture to one *Thomas Blakesley*, of *Hinckley*, framework knitter. He served *Thomas Blakesley*, and inhabited in the parish of *Hinckley* for forty days and upwards under the indenture, and did not gain any subsequent settlement elsewhere.

On behalf of the respondents, the parish clerk of *Kenilworth*, in *Warwickshire*, was called, who produced from the parish chest an instrument purporting to be an indenture of apprenticeship, bearing date 13th *July*, 1791, whereby the churchwardens and overseers of the poor of that parish, with the consent of two justices of the peace, bound *Samuel Walton*, a poor child of the parish, apprentice to *Thomas Blakesley*, of the parish of *Hinckley*, framework knitter. The indenture produced was executed by *Thomas Blakesley* only, and at the end of it was the consent of the justices, signed by them.

On the respondents proposing to read this indenture it was objected, on behalf of the appellants, that it was not admissible as evidence of the apprenticeship :

First. Because it was not under seal of the churchwardens and overseers of the poor of the parish of *Kenilworth*.

Secondly. Because, being a parish indenture, in which the churchwardens and overseers of the poor of the parish of *Kenilworth* were stated to be the binding parties, it was not executed by any or either of them.

The respondents, in answer to this objection, called the attention of the Court to the testatum clause in the indenture produced, " In witness whereof the said parties above said to these present indentures interchange-

ably have put their hands and seals the day and year above written," and said that the indenture was in fact a counterpart and not a duplicate. And further, that the indenture produced was under the hand and seal of *Thomas Blakesley* the master, and was kept by the churchwardens and overseers of *Kenilworth*, who would be the proper parties to enforce the covenants by the master, and that this indenture was produced from the proper custody.

The respondents upon this withdrew the indenture for a time, and called *Elizabeth Walton*, the widow of *Samuel Walton*, in order to prove a search for the other part of the indenture, and she produced some papers which had belonged to her deceased husband, and swore that these were all her husband's papers which had come to her hands at his death, and that her husband, as she believed, had no other papers; and among these papers no indenture was found. No other search in any other quarter was shewn.

To this it was objected by the appellants that the apprentice's house was not a probable place of deposit, and that any search among the papers of a parish apprentice was useless, that, if it were of any avail, sufficient search had not been shewn; and that the indenture, although produced out of the proper custody, was defective for the reason before stated.

The Court of Quarter Sessions however admitted the document produced as evidence of the apprenticeship, and upon proof of inhabitancy and service during a sufficient portion of the period of time mentioned in the indenture, confirmed the order, subject to the opinion of this Court as to whether they were right in receiving the indenture in evidence.

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 The QUEEN was admissible in evidence for the purpose of proving the
 v. apprenticeship, then the order of the justices is to be
 Overseers of HINCKLEY. confirmed. If the Court should be of a contrary opinion,
 then the order is to be quashed.

Mundell and Dalby, in support of the order of Sessions.—The absence of the part of the indenture of apprenticeship executed by the parish officers was sufficiently accounted for to render admissible the evidence of the counterpart executed by the master. Search for the former part was made among the papers of the apprentice, and although it would have been prudent to search among those of the master also, that was not indispensable. *Gulley v. The Bishop of Exeter*, in the note to *Rex v. The Inhabitants of Denio (a)*, is in point. There the former owner of an advowson was alleged to have granted the then next presentation, which grant was put in issue by a plea in quare impedit. The original deed of grant of the next presentation not being found annexed as usual, to the presentation, it was held that the proper custody was amongst the muniments of the party then seised of the advowson; and a counterpart, purporting to be executed by the grantee, was held to be admissible as secondary evidence of the grant, without proving a search amongst the papers of the personal representatives of the grantee. In that case, add the reporters, no profert of the grant appears to have been necessary. *Brewster v. Sewell (b)* was an action of libel, imputing to the plaintiff that he made fraudulent claims respect-

(a) 1 *Man. & R.* 294. 297-8. See also 4 *Bing.* 290. 294. 298.

(b) 3 *B. & A.* 296.

ing a loss by fire on a Company with which he had effected an insurance. The plaintiff not being able to produce the original policy, called the agent of the Company, who stated that the policy was placed in his hands after the fire, and retained by him until the plaintiff made another larger insurance; that the original policy then became a useless paper; that he had searched for and could not find it, and rather thought he returned it to the plaintiff. A few days before the trial, the plaintiff and the clerk to his attorney searched the drawers where the plaintiff's papers were kept, and many other parts of his house, but did not search the outhouses, barns, hay-loft, or granary. This was held sufficient to let in secondary evidence of the policy. *Abbott C. J.* says, p. 299, "There was no reason to suppose, that the policy could, at any future time, be called for, to answer any reasonable purpose whatever. In that respect, such a document differs most essentially from an indenture of apprenticeship. The latter instrument may be useful, after the apprenticeship is expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement." In *Hall v. Ball (a)*, where trover was brought by a lessor for an indenture of lease which was alleged to have been determined by a proviso therein contained, the counterpart executed by the lessor not being produced by the defendant on notice, it was held that the lessor might give parol evidence of its contents without producing the counterpart executed by the lessee. And *Maule J.* says, p. 247, "An expired indenture of apprenticeship sometimes remains with the master, sometimes with the apprentice." The reporters add in a note, "The

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(a) 3 *Man. & Gr.* 242.

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latter appears to have the greater interest in its preservation." In *Doe d. The Earl of Egremont v. Pulman* (a), in ejectment against a lessee, in order to prove the land part of the estate of the lessor's ancestor, a counterpart of a lease of it executed by the lessee alone was produced from the ancestor's muniment room, and although no proof was given of any search for the part executed by the lessor, or of notice to produce it, or of actual possession under it, it was held admissible, as being found where such an instrument would properly be. [Mellor J. If the search for a document is made in a place proper for its deposit, we ought not to set aside the decision of a Court admitting the document in evidence because it is suggested there may be some other place of deposit.]

The Court will not review the judgment of the Sessions as to the sufficiency of the search for a document. In *Reg. v. The Inhabitants of Saffron Hill* (b), Lord Campbell, says, at pp. 95 6, "I think the order must be confirmed, on the ground that the case does not disclose enough to enable us to say that the Court of Quarter Sessions was wrong in deciding that there was not evidence of search for the document sufficient to make secondary evidence of its contents admissible." And the same view is there taken by Coleridge J. In *Reg. v. The Inhabitants of Kenilworth* (c), Coleridge J. says, pp. 651-2, "If the precise rules of evidence were applicable, the objection might perhaps be well founded. But that is not so. The preliminary proof is given to enable a judicial tribunal to determine whether secondary evidence can be submitted to them. In such a case a looser rule

(a) 3 Q. B. 622.

(b) 1 E. & B. 93.

(c) 7 Q. B. 642.

of evidence may prevail. The magistrates and the Sessions were to make up their minds, not whether the document was destroyed or not, but whether there had been a bonâ fide search and not mere carelessness and neglect, or fraud, in not producing. In every instance of the sort, therefore, all the circumstances must be taken into account; and different rules will prevail in different cases." [*Crompton J.* I cannot help thinking that, if a Judge at Nisi prius were to rule that it was unnecessary to search in certain places for a document, we should not overrule his decision.]

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Merewether and *R. H. Palmer*, contra.—In order to render secondary evidence of a document admissible, it must be shewn that search was made for the original in all places where it might probably and reasonably be expected to be found. As, therefore, the original document in the present case was traced to the hands of the master, a search for it among his papers ought to have been shewn. Where an indenture of apprenticeship consisted of two parts, and that which remained with the parish had been destroyed, while that which had been given to the master was, on an assignment of the pauper, delivered to a female assignee, who, when asked for it, said she could not find it, and did not know where it was, but she was not subpœnaed, it was held that secondary evidence was not admissible; *Rex v. The Inhabitants of Castleton* (a). [*Blackburn J.* There the assignee was alive. Here a period of sixty-nine years elapsed since the apprenticing.] The observations in *Brewster v. Sewell* (b) and *Hall v. Ball* (c) are mere obiter dicta.

(a) 6 T. R. 236.

(b) 3 B. & A. 296. 299.

(c) 3 Man. & Gr. 242. 247.

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CROMPTON J. Although I have felt considerable doubt on the subject, I do not see my way clearly to say that the Sessions were wrong in holding this document admissible in evidence. There is a good deal in what is said by Maule J., in *Hall v. Ball* (d), that "an expired indenture of apprenticeship sometimes remains with the master, sometimes with the apprentice:" but what Lord Tenterden says in *Brewster v. Sewell* (e) is most reasonable and correct, that there is no reason why the master should keep it after the apprenticeship is over. My brothers take strongly the view, from which I shall not dissent, that the great probability is, that if the master had the document he would destroy it, and therefore that the apprentice was the most likely depository. At the same time I cannot help thinking that the rule is that all probable places ought to be searched.

BLACKBURN J. The only question is whether a sufficient search was made for this document to let in secondary evidence. The first inquiry is, where would the document naturally be, if still in existence, for there the search should be made, and, if it is not found there, then, according to the rule laid down in *M'Gahey v. Alston* (f), secondary evidence will be admissible. Whether there has been reasonable evidence

(a) 4 M. & S. 48.

(c) 3 B. & Ad. 460.

(e) 3 B. & A. 296. 299.

(b) 7 B. & C. 620.

(d) 3 Man. & Gr. 242. 247.

(f) 2 M. & W. 206.

of such a search is a question of mixed law and fact, which it was for the Sessions to determine. I do not, however, agree with what was urged in the course of the argument, that we cannot review their decision upon it, —like all other questions reserved for our decision as a Court of appeal, we are to see if the Court below acted rightly.

The facts here are these. So far back as 1791 a person entered into a service which we must take purported to be an apprenticeship. During its continuance the indenture of apprenticeship would naturally be with the master, for he had an object in enforcing the observance of its covenants. When that period expired he had no longer any interest in it, but the apprentice had, because the deed of his apprenticeship would serve to prove his freedom, settlement, &c. ; and I believe, in practice, masters give up such documents shortly after the apprenticeship is over. Then comes the inquiry what is the *most* proper custody for it? the answer to which is, that place where, according to the ordinary course of business, it would be found ; and that, I think, is with the apprentice. It is laid down in 1 *Taylor on Evidence*, p. 388, § 402, 3d ed., that “ an expired indenture of apprenticeship remains sometimes with the master, sometimes with the apprentice ; but as the apprentice appears to have the greatest interest in its preservation, stricter inquiry should be made of him than of the master, though, in the absence of positive proof respecting the possession, search should be instituted among the papers of both.” I do not disagree with that at all ; but when the probability is shewn to be that in the course of business, without any great dereliction of duty, the document would be in another place than

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that in which the search has been made, the Judge would require search to be made in that other place, if the parties did not reasonably satisfy him that the first search was better. Several cases are given in that work, p. 387, sect. 401, shewing that, where it would be the duty of parties to deposit documents in a particular place, the not finding them there is sufficient to let in secondary evidence; although if any grounds of suspicion presented themselves to the mind of the Judge that those parties had the documents, he would probably require them to come and be examined about them. Here are some of the cases: "Where it appeared that a parish indenture of apprenticeship had been given to a person since dead to take to the overseers, and a fruitless search was made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted, though none of the overseers were called, and no inquiry was made of the personal representative of the party, who ought to have delivered it to the parish officers." The reason of that is, because the probability as to where the document was was so very clear. Again, "where it was the duty of a paying clerk of a parish to deposit a certain cancelled cheque in a room of the workhouse, an application to the successor of this clerk for an inspection of the cheques in the room, and an ineffectual examination of several bundles, which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called." There it would have been to some extent dishonest in the clerk not to put the

papers in that place: here that principle cannot apply. Probably so long as the transaction was recent, it would have been proper to inquire further than was done in this instance, but after the lapse of sixty-nine years the justices might fairly conclude that it was unnecessary.

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MELLOR J. In order to give secondary evidence of a document, you must satisfy the tribunal that proper search has been made for the original. If this had been very shortly after the apprenticeship the Sessions ought not to have been satisfied without proof of a search in both places; *i. e.*, with the master and also with the apprentice. But as so long a time has elapsed since the force of the document was spent, and as most likely it would be given up to the apprentice, seeing that he was interested in it, whereas the master was not, the Sessions were quite justified in saying that they were satisfied with a search among the papers of the apprentice only.

I entirely agree that we have jurisdiction to review the decision of the Sessions, if necessary, on this point; but before we reverse it we must be satisfied that a reasonable search was not made, and I certainly cannot say that such was the case here.

Order of Sessions confirmed.

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Thursday,
May 7th.

PROWSE *against* LOXDALE.

*Second action.
Staying pro-
ceedings.
Security for
costs.*

1. On the trial of an action for libel in the C. B., to which a justification was pleaded, the plaintiff's counsel, after his reply, elected to be nonsuited. The plaintiff then brought an action in this Court for the same libel, and on the 13th *January* delivered a declaration, which was the same as in the first action. On the 14th *January* the defendant's costs in the first action were taxed. On the 21st he obtained time to plead. On the 22d he took out a summons to stay proceedings in the action until the plaintiff had paid the costs of the first action and given security for the costs of the second. On the 24th the Judge indorsed the summons "No order, without prejudice to any application to the Court." On the 30th a rule in similar terms was obtained and served upon the plaintiff's attorney. In the meantime the defendant had pleaded, his plea being the same justification, and issue being joined, the plaintiff, on the 28th, gave notice of trial, and delivered briefs to counsel before the service of the rule. When the plaintiff commenced the first action he was bankrupt, and his discharge had been suspended for one year from the 13th *May*, 1862, with protection for one month. The Court, in the exercise of its discretion, made the rule absolute for staying proceedings; but discharged so much of it as related to security for costs.

RULE calling upon the plaintiff to shew cause why all further proceedings in this action should not be stayed until the plaintiff had paid the costs of a former action brought by him against the defendant, and until he had given security for costs in this action.

Both actions were brought for the same libel published in a newspaper called *The West Middlesex Advertiser*, and in both the defendant pleaded a justification. The first was brought in the Court of Common Pleas, and on the trial, before *Willes J.*, at the *London* Sittings after *Michaelmas* Term, 1862, the plaintiff's counsel, after his reply, elected to be nonsuited. At the time when the plaintiff commenced that action he was a bankrupt, and on the 13th *May*, 1862, his discharge under The Bankrupt Act was suspended for one year, with protection for one month. The present action was commenced in

December, 1862 ; and the declaration, which was for the same cause as in the former action, was delivered on the 13th *January*, 1863. Judgment having been signed in the former action the plaintiff's costs in it were taxed on the 14th *January* at 7*l.* 1*s.* 0*d.*, and had not been paid. On the 21st *January* the defendant obtained time to plead on the usual terms. On the 22nd *January* he took out a summons before a Judge at Chambers, in similar terms to those of the present rule, which was heard on the 24th, before *Wightman J.*, who indorsed the summons "No order, without prejudice to any application to the Court." On the 30th *January* the present rule was obtained before *Mellor J.*, in the Bail Court, and was served on the plaintiff's attorney on the evening of that day. In the meantime the defendant had pleaded his plea, being the same justification, and, issue being joined, the plaintiff, on the 28th *January*, gave notice of trial for the first Sittings in *Middlesex* after *Hilary Term*, and had delivered briefs to counsel before the service of the rule.

On the argument of the present rule the counsel for the defendant stated that he had waited in Court to move for it on several previous days in *Hilary Term*, but had no opportunity of moving until the 30th *January*.

Daly shewed cause.—The Court will not interfere to prevent the plaintiff bringing a second action for the same cause as the first, unless they believe that the second action is brought oppressively and vexatiously ; 2 *Archb. Pr.*, 11th ed. by *Prentice*, 1370 ; *Danvers v. Morgan* (a). Further, the defendant is too late in making

(a) 17 *C. B.* 530, 533.

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this application, after having obtained time to plead and allowed the plaintiff to prepare for trial.

Philbrick, contra.—The Court has a discretionary power at any time to stay proceedings in a second action, notwithstanding the plaintiff has taken a step in the cause; *Fletcher v. Lew (a)*. In *Weston v. Withers (b)* the Court exercised its discretion in an action of trespass for taking goods as a distress for rent, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued in formâ pauperis. [He also cited *M'Culloch v. Robinson (c)* and *Crawley v. Impey (d)*.]

CROMPTON J. An application of this kind is made to the discretion of the Court; and I think that in the exercise of our discretion we ought to stay the proceedings in this action until the costs of the first action have been paid. The plaintiff is a bankrupt, whose certificate has been suspended; and we therefore cannot make him give security for costs because that would, in effect, prevent him going to law. Having gone before a jury to try the first action when there was a full opportunity of justice being administered to him, he withdrew at the close of the case; and now he brings a second action for the same cause. If the first action had been tried and there had been any mistake by the plaintiff or his attorney on the trial of it, the plaintiff could not have obtained a

(a) 3 A. & E. 557; 5 N. & M. 351.

(b) 2 T. R. 511. At the foot of p. 511 of the copy of 2 T. R. in the library of the Court of Queen's Bench, is the following MS. note. "7 Feb. 1810 a like rule, *Gibbon v. Coggan*," and under it is written the following memorandum. "This note is in the handwriting of Sir Wm. Garrow. J. Gurney."

(c) 2 N. R. 352.

(d) 8 Taunt. 407.

new trial without payment of costs. Under these circumstances the bringing of a second action is occasioned by the fault of the plaintiff, and it is oppressive on the defendant.

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BLACKBURN J. I am of the same opinion. It does not necessarily follow that, where a plaintiff fails in a first action and brings another, the second action is oppressive. In *Danvers v. Morgan (a)*, where the first action failed because there was no notice of action pursuant to The Metropolitan Police Act, 10 G. 4. c. 44., the second action was not oppressive, and the Court refused to stay proceedings in it until the costs of the first action were paid. But here the second action is for the same matter as in the first, which was brought by a plaintiff who had no funds, and who at the last moment, when the jury were about to put an end to litigation, and there was an opportunity of finally concluding the whole matter, withdrew the cause from the jury, for what reason does not appear, and there was judgment against him for costs. Then he brings another action in a different Court, which can however make no difference with reference to this application, and he does not pay the plaintiff the costs of the first action. I think that continuing the litigation without the means of paying the costs is oppressive. I agree that the application against the plaintiff ought to be made with reasonable promptitude; and if he were lured on to incur costs, that might be an answer to it; but looking at the dates and circumstances I cannot see that there was any improper delay in taking out the summons, and though the plaintiff had delivered briefs

(a) 17 C. B. 530.

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and incurred costs in preparing for the trial, it is not shewn that he was not aware that the defendant was dissatisfied with the decision of the Judge at Chambers, and as the defendant had obtained leave to come to the Court the plaintiff would know that in all probability he would do so. It is a matter in the discretion of the Court to make the order prayed for, and in the present case I think we ought to make it.

MELLOR J. I think it would be a great hardship on the defendant if we allowed him to be put to the costs of a second trial before the plaintiff had paid the costs of the first. Where the first action did not fail on any technical ground, such as the want of a proper notice of action; and on the trial the plaintiff's counsel, after having heard the defendant's case, and after the reply, chose to withdraw the cause from the jury, it appears to me that it would be a great hardship and most oppressive on the defendant, who had been at the expense of bringing his witnesses to that trial, and had arrived at a stage of the litigation when a verdict in his favour would be a plea in bar to another action, that he should be exposed to a second action for the same cause without receiving the costs of the previous nonsuit. I am glad of the opportunity of putting an end to such a vexatious course of proceeding.

Rule absolute to stay proceedings until
the costs of the first action be paid:
discharged as to the residue.

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The QUEEN against JAMES and another.

Wednesday,
April 29th.

Under stat. 14 & 15 *Vict. c. 16.*, districts were formed and highway boards constituted for the management of highways in *South Wales*, and district surveyors were appointed. By stat. 23 & 24 *Vict. c. 68. s. 6.*, the district surveyor is to have "all duties, powers, and responsibilities as regards the parishes in such district, of a surveyor elected under" stat. 4 & 5 *W. 4. c. 50.*; "and all acts and provisions not hereby repealed, applicable to such last mentioned surveyor, shall, save as herein otherwise provided, apply in like manner to a surveyor of highways of a district appointed under this Act:" and by sect. 43, except as otherwise provided, all the provisions of stat. 5 & 6 *W. 4. c. 50.* were to remain in force and be applicable to the highways to be managed under the later Act, and the two Acts were to be construed together as one Act. Sect. 40 re-enacted sect. 90 of stat. 5 & 6 *W. 4. c. 50.*, substituting a summons on the district surveyor for a summons on the parish surveyor; but sect. 95 of the earlier Act was not expressly re-enacted. Held that that section remained in force; and therefore where, on the hearing of a summons against the district surveyor for the non-repair of a highway in *South Wales*, he denies, on behalf of the inhabitants of the parish, the obligation to repair, the justices may direct an indictment to be preferred against the parish.

Highway.
Non-repair.
Liability
disputed.
Indictment.
Order of jus-
tices.
South Wales.
5 & 6 W. 4.
c. 50. s. 95.
23 & 24 Vict.
c. 68.

ON the 6th *March*, 1862, three justices, acting in and for the division of *Kenes*, of the county of *Pembroke*, made an order, which : after reciting an information that there was a common and public highway in the parish of *Meline*, in the said county, and that after the passing of stat. 23 & 24 *Vict. c. 68.*, "An Act for the better management and control of the highways in *South Wales*," a part of the said highway being wholly in the said parish and wholly within the said division, and wholly within the *Newport* Highway District in the said county [the part of the road was described and its measurement stated], on &c., was out of repair; and that the inhabitants of the said parish the said part of the said highway of right ought to have repaired; and further reciting that a summons had been issued requiring *John James*, the district surveyor of the highways for the Highway Dis-

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trict of *Newport*, and the overseers of the said parish, to appear at the Petty Sessions for the highways for the *Kenes* division, and, that the district surveyor appeared in pursuance of the summons, and on the hearing thereof, denied, on behalf of the inhabitants of the said parish, that the alleged highway so complained of was a highway in fact, and denied the duty and obligation of the said inhabitants to repair such part of the alleged highway as in the information was described as being out of repair: adjudged the information to be true, and that the road complained of was a highway and was out of repair, and therefore ordered and directed that the informant do prefer a bill of indictment, and subpoena the necessary witnesses in support thereof, at the Quarter Sessions, against the inhabitants of the said parish, for suffering and permitting the said highway to be out of repair.

In *Michaelmas* Term, 1862, *Field* obtained a rule calling upon the prosecutors to shew cause why the above order, which had been brought up by certiorari, should not be quashed, on the ground that the justices had no jurisdiction to make it within stat. 23 & 24 *Vict.* c. 68.

Giffard shewed cause.—The 95th section of The Highway Act, 5 & 6 *W.* 4. c. 50., remains in force as regards highways in parishes subject to the provisions of stat. 23 & 24 *Vict.* c. 68. By sect. 94 of stat. 5 & 6 *W.* 4. c. 50., which contains provisions for enforcing the duty of repairing a highway when the duty or obligation of repairing it does not come in question, an order is to be made upon the surveyor as the person who has neglected the duty, and in default of

the repairs being effectually made within the time limited, he is to forfeit a sum of money requisite for repairing the highway, which is to be placed in the hands of a person named by the justices and applied to its repair. Sect. 95 directs that if "the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish," the justices shall direct a bill of indictment to be preferred. Stat. 7 & 8 Vict. c. 91. consolidated and amended the laws relating to turnpike trusts in *South Wales*. Stat. 14 & 15 Vict. c. 16., the first Act for the better management and control of the highways in *South Wales*, transferred part of the duties and powers of parish surveyors to a highway board, and it was accordingly necessary to alter in some respects the duties of those surveyors, and make them, as to some matters, subject to that board. Sect. 16 of that Act was substituted for sect. 94 of stat. 5 & 6 W. 4. c. 50., the only difference being that the surveyor of the district was in the first instance to be summoned instead of the parish surveyor; but the order for payment of the sum of money necessary for repairing the highway was to be made on the parish surveyor; and it concluded with the same proviso as that at the end of sect. 94 of the former Act, "that the said justices shall not have power to make such orders as aforesaid in any case where the duty or obligation of repairing the said highway comes in question." Sect. 17 enacted that, except as therein otherwise provided, all the provisions of stat. 5 & 6 W. 4. c. 50. should remain in force and be applicable to the highways to be managed under that Act, and that the two Acts should be construed together as one Act. Consequently sect. 95 of stat. 5 & 6 W. 4. c. 50. was untouched by that Act. Stat. 23 & 24 Vict.

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c. 68., by sect. 1, repeals stat. 14 & 15 *Vict. c. 16.*, but provides that the highway districts and the appointment of officers shall not be affected by that repeal. By sect. 6 the district surveyor, except for the purpose of making rates, and as therein otherwise provided, is to "have all duties, powers, and responsibilities, as regards the parishes in such district, of a surveyor elected under" stat. 5 & 6 *W. 4. c. 50.* Sect. 40 is the same as sect. 16 of the repealed statute, except that the order for payment of money is to be made upon the overseers of the poor instead of the parish surveyor, and concludes with the same proviso. Sect. 43 enacts:—"Except as herein otherwise provided, all the provisions of the said Act of" 5 & 6 *W. 4. c. 50.* "shall remain in force and be applicable as well to the highways to be managed under this Act as to the highways which may continue to be managed under that Act, and the said Act and this Act shall be construed together as one Act." Unless this order is valid, presentment being abolished by stat. 5 & 6 *W. 4. c. 50. s. 99.*, the six counties of *South Wales* will be without remedy for the non-repair of highways except by indictment at common law, on which no costs can be recovered. Stat. 25 & 26 *Vict. c. 61.*, which authorizes the formation of highway districts in *England*, re-enacts, in sect. 19, the provision of sect. 95 of stat. 5 & 6 *W. 4. c. 50.* as to the payment of the costs of the prosecution where the liability to repair is denied; only they are to be paid "by such party to the proceedings as the Court before whom the case is tried shall direct."

Field and J. W. Bowen, contra.—The 95th section of stat. 5 & 6 *W. 4. c. 50.* is not incorporated in or kept

in force by stat. 23 & 24 *Vict. c. 68.* as regards parishes subject to its enactments. The surveyor under the earlier statute is appointed by the inhabitants of the parish in vestry assembled, and it is his duty to maintain and repair the parish roads; and, by sect. 111, he cannot charge the expenses of defending an indictment against the parish unless the inhabitants, whose servant he is, have agreed, at a vestry, to defend it. There is a distinction between the parish surveyor under that statute and the district surveyor under stat. 23 & 24 *Vict. c. 68.* [*Mellor J.* By stat. 23 & 24 *Vict. c. 68. s. 6.*, "All Acts and provisions not hereby repealed, applicable to such last mentioned surveyor," that is a surveyor under stat. 5 & 6 *W. 4. c. 50.*, "shall, save as herein otherwise provided, apply in like manner to a surveyor of highways of a district appointed under this Act."] But this is otherwise provided for by implication. The district surveyor is appointed by the County Roads Board, sect. 3; and is to act under the directions and control of, and is to be indemnified by, the Highway Board in respect of all expenses and liabilities properly incurred by him, sect. 6. If it had been intended that sect. 95 of stat. 5 & 6 *W. 4. c. 50.* should be still in force, he would have been made the parish surveyor. [*Crompton J.* By sect. 6 of stat. 23 & 24 *Vict. c. 68.*, he seems to have two masters.] Sect. 7 places the maintenance and repairs of highways under the care and management of the Highway Board. The parish, therefore, have no power to repair the highways, and cannot appear to an indictment against them for non-repair. [*Crompton J.* That argument applies to all turnpike roads.] The Turnpike Act, 3 *G. 4. c. 126.*, contains a special clause, sect. 110, as to indictments against a parish for not

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 v. left to an indictment at common law. Sect. 40 of stat.
 JAMES. 23 & 24 *Vict. c. 68.*, which re-enacts sect. 94 of stat. 5 & 6
 W. 4. c. 50., and is not followed by an enactment corres-
 ponding to sect. 95 of that Act, impliedly repeals that
 section. The peculiar legislation in sect. 95 of stat.
 5 & 6 *W. 4. c. 50.* was that, at all events, the costs of
 the prosecution should be paid by the inhabitants of the
 parish; *Reg. v. The Inhabitants of Heanor (a)*, *Reg. v.*
 The Justices of Surrey (b), before *Wightman J.* This
 was found oppressive; and therefore stat. 25 & 26 *Vict.*
 c. 61., for the better management of highways in
 England, which is framed on the model of stat. 23 & 24
 Vict. c. 68., departs from that policy, and by sect. 19
 makes the payment of the costs dependent on the discre-
 tion of the Court which tries the indictment. Sect. 95
 of stat. 5 & 6 *W. 4. c. 50.* cannot be read with sect. 40 of
 stat. 23 & 24 *Vict. c. 68.*, because the summons which
 it mentions is a summons on the parish surveyor,
 whereas the summons in sect. 40 is on the district
 surveyor.

COCKBURN C. J. I am of opinion that this rule ought
 to be discharged. It is not, at first sight, easy to recog-
 nise the effect of such an enactment as sect. 43 of stat.
 23 & 24 *Vict. c. 68.*; but, on closely looking at the
 provisions of that Act, and of The Highway Act, 5 & 6
W. 4. c. 50., I think that, without straining the language,
 we may conclude that this order was right. It is clear
 that the order would be good under stat. 5 & 6 *W. 4.*

(a) 6 Q. B. 745.

(b) 1 B. C. C. 70; 21 L. J. M. C. 195; 16 Jur. 641.

c. 50. ; but it is said that stats. 14 & 15 *Vict. c. 16.* and 23 & 24 *Vict. c. 68.* have the effect of repealing the 94th and 95th sections of that Act as to the counties in *South Wales*. It is argued that, by these latter Acts, a new machinery is established for the maintenance and repair of highways in *South Wales* differing from the procedure under The Highway Act ; that highway districts and highway boards are substituted for parishes, and a district surveyor is appointed for the highways, in whom, as representative of the Highway Board, are vested the powers which the parish surveyors of the different parishes formerly exercised. But, substantially, the powers and duties of the two officers are the same. By sect. 40 of stat. 23 & 24 *Vict. c. 68.*, which makes provision for a highway being out of repair, stat. 14 & 15 *Vict. c. 16.* being repealed, the district surveyor is to be summoned, and if the fact of the highway not being in a state of repair is established, the justices are to order the district surveyor to repair it, and a mode of raising the funds for that purpose is provided ; but in the concluding proviso there is a special exception of the case in which the obligation to repair comes in question. The Legislature, therefore, contemplated the case of a highway being out of repair and the liability of the parish to repair it being denied. Mr. *Field* invited us to infer that, because the 94th section of stat. 5 & 6 *W. 4. c. 50.* is re-enacted by the 40th section of stat. 23 & 24 *Vict. c. 68.*, and no enactment is substituted for the 95th section of stat. 5 & 6 *W. 4. c. 50.*, the intention was to repeal that section, and to leave the cases in which the parish denies the obligation to repair without any provision for payment of the prosecutor's costs ; and he alleged that such an intention was not improbable because sect. 95

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of stat. 5 & 6 *W. 4. c. 50.*, which makes the parish liable for the payment of costs in all cases, had been found to be oppressive. But it would be equally inconvenient if the Legislature had enacted that no costs should, under any circumstances, be given to the prosecutor when the obligation to repair was disputed. Being, therefore, averse to adopting the latter alternative, it is necessary to see whether stat. 23 & 24 *Vict. c. 68.* has not made provision for this case. Sect. 6 gives the district surveyor, except as therein otherwise provided, all the duties, powers and responsibilities, as regards the parishes in the district, which the parish surveyor had under stat. 5 & 6 *W. 4. c. 50.* And since all the machinery established by the old Highway Act is kept in operation by stat. 23 & 24 *Vict. c. 68.*, I think that as under sect. 94 of stat. 5 & 6 *W. 4. c. 50.*, the parish surveyor was the party to be summoned in the event of a highway being out of repair, so under sect. 40 of stat. 23 & 24 *Vict. c. 68.*, the district surveyor is now to be summoned. I feel the force of the argument that the highway surveyor was elected by the parish, whereas the district surveyor is appointed by the County Roads Board, and therefore does not represent the parish before the justices; but still he is the officer of the aggregate of the parishes which constitute the district, and it is not likely that he would undertake to dispute the liability of a parish to repair a highway without their consent. It is true that sect. 95 of stat. 5 & 6 *W. 4. c. 50.*, remains as oppressive on parishes in *South Wales* as before the passing of stat. 25 & 26 *Vict. c. 61.*, which by sect. 19 qualifies the operation of that section as to parishes in *England*; and it is to be hoped that some legislative enactment will be passed to put both on the same foot-

ing. But the legislature having, instead of repealing sect. 95, qualified it with reference to highways and parishes in *England*, cannot have intended that in *South Wales* a prosecutor should be subject to the certainty of contesting the liability of a parish at his own costs.

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CROMPTON J. I am of the same opinion. The 94th and 95th sections of stat. 5 & 6 W. 4. c. 50. present two alternatives: by sect. 94 if the obligation to repair is not denied a certain course of recovering the expense of putting the highway in repair is prescribed; the other alternative is provided for by sect. 95: and I do not see why, because sect. 94 is modified by sect. 40 of stat. 23 & 24 Vict. c. 68., the 95th section should not remain in force. The only difficulty is in applying the word "such" in sect. 95, which begins with saying that "if on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied;" but that ought not to weigh, because by sects. 6 and 43 of stat. 23 & 24 Vict. c. 68. the two Acts are to be read together and taken as one, and the word "such" in the former Act must be taken to refer to the antecedent summons in the 40th section of the latter. The proviso at the end of sect. 40 of stat. 23 & 24 Vict. c. 68. shews that the Legislature contemplated the case of the liability being denied: and according to Mr. *Field's* argument there is no provision for that alternative. It is said that there is a difficulty as to who is to represent the parish in disputing their liability before the justices. It is not necessary to determine that; but I do not know why the district surveyor should not take the opinion of the parish on that matter, as the parish surveyor used to do. According to stat. 23 & 24 Vict. c. 68. s. 40., a disputed lia-

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bility must be made out before the justices in order to stay their hands, and whether it is made out by the district surveyor or not is immaterial. It is also said that if the Legislature had intended to preserve the power of directing an indictment to be preferred they would have re-enacted sect. 95 of stat. 5 & 6 *W. 4. c. 50.*; but I do not see that, for they have enacted in sect. 43 that, except as therein otherwise provided, all the provisions of stat. 5 & 6 *W. 4. c. 50.* shall remain in force. In the repealed statute, 14 & 15 *Vict. c. 16.*, immediately after sect. 16, which modified sect. 94 of stat. 5 & 6 *W. 4. c. 50.*, there followed a section enacting that, except as therein otherwise provided, the provisions of stat. 5 & 6 *W. 4. c. 50.* should remain in force; and in that way sect. 95 was made to apply to the new state of things. I cannot see that the force of this is weakened in stat. 23 & 24 *Vict. c. 68.* merely because two sections are interposed between sect. 40 and sect. 43, which are equivalent to sect. 16 and sect. 17 of the repealed statute. If there had been any doubt upon the point in this case it would have been raised before.

BLACKBURN J. I also am of opinion that this rule ought to be discharged. The question turns on stat. 23 & 24 *Vict. c. 68.*, which, by sect. 43, enacts that, except as therein otherwise provided, all the provisions of stat. 5 & 6 *W. 4. c. 50.* shall remain in force and be applicable to the highways to be managed under the later Act, and the two Acts shall be construed as one. It follows from this scheme of legislation that sometimes the language of a particular provision in the Act referred to will not suit well in the new Act; and that some strain must be laid on that language. Here the thing to be remembered is that, by sect. 94 of stat. 5 & 6 *W. 4. c. 50.*,

and by sect. 40 of stat. 23 & 24 *Vict. c. 68.*, whether a highway is repairable by the parish or by some individual or body corporate, the Legislature trusts the justices to determine whether it is out of repair. By sect. 94 of stat. 5 & 6 *W. 4. c. 50.*, the party summoned may be either the surveyor of the parish, or other person or body politic or corporate chargeable with such repair; and so, by sect. 40 of stat. 23 & 24 *Vict. c. 68.*, he may be either the surveyor of the district, or other person or body politic so chargeable; but by the proviso at the end of each section, if the duty or obligation of repairing the highway comes in question, the justices shall hold their hands: so that sect. 40 of stat. 23 & 24 *Vict. c. 68.* is, in all substantial respects, the same as sect. 94 of stat. 5 & 6 *W. 4. c. 50.*,—in the case of a parish the district surveyor being summoned instead of the parish surveyor. Construing the two Acts as one Act, we must read sect. 95 of stat. 5 & 6 *W. 4. c. 50.* as immediately following sect. 40 of stat. 23 & 24 *Vict. c. 68.*; and requiring the Court before whom the indictment on which depends the question whether the road is a parish or a private road is tried, to order the costs of the prosecution to be paid out of the highway rate. The great strength of Mr. *Field's* argument, viz. that the district surveyor is not the parish surveyor, therefore fails, because it is the same whether the obligation is traversed by the parish, or by a private individual, or by a body corporate. It comes to this, that some strain must be put upon the word "such" at the beginning of sect. 95, in reading it with stat. 23 & 24 *Vict. c. 68.*; and I think the words "if on the hearing of any such summons," in sect. 95 of stat. 5 & 6 *W. 4. c. 50.*, must be read as applying to the summons in the 40th section of the later Act.

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MELLOR J. The present case is an instance of the great inconvenience of legislating in this manner. If the framer of stat. 23 & 24 *Vict. c. 68.* had intended to repeal sect. 95 of stat. 5 & 6 *W. 4. c. 50.* by reason of the hardship which it throws on parishes, he would have referred to and repealed it. Instead of that there is an express declaration in sects. 6 and 43 of an intention not to interfere with the enactments of stat. 5 & 6 *W. 4. c. 50.* farther than is specially provided.

Mr. *Field* has raised difficulties, all of which I do not attempt to solve; one of which was, out of what fund are the costs of the prosecution to come? Sect. 95 of stat. 5 & 6 *W. 4. c. 50.* says that they shall be paid out of the rate made and levied in pursuance of that Act; and I see nothing in stat. 23 & 24 *Vict. c. 68.* to prevent the parish surveyor making and levying a rate to pay the costs ordered by the Judge of Assize or the Quarter Sessions. With reference to cases in which the liability to repair is disputed, no provisions are substituted for those in sect. 95 of the former Act; and there is nothing to shew that they were intended to be repealed. I agree with the Lord Chief Justice that there is much less anomaly in our deciding that sect. 95 of the former Act is still in force than in leaving *South Wales* in a different condition from the other parts of *England* as to indictments for the non-repair of highways and the payment of the costs of prosecutions where the liability to repair is disputed. As to the objection founded on the word "such" I see no difficulty: it refers to the process.

Rule discharged and Order affirmed.

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WILSON, appellant, *against* STEWART, respondent. *Saturday, May 2d.*

If the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of stat. 2 & 3 *Vict. c. 47. s. 44.*, and the servant does so, the master is guilty of an offence within that Act, and the servant is guilty as aiding and abetting him within stat. 11 & 12 *Vict. c. 43. s. 5.*

Master and servant. Aiding and abetting. 2 & 3 Vict. c. 47. s. 44. 11 & 12 Vict. c. 43. s. 5.

SPECIAL case stated for the opinion of the Court, under stat. 20 & 21 *Vict. c. 43.*, by one of the magistrates of the Police Courts of the Metropolis, sitting at the Police Court, *Marlboro' Street*, in the county of *Middlesex*, and within the Metropolitan Police District.

The respondent appeared before the magistrate upon a summons to answer the complaint of the appellant, charging him, for that he on the 17th *January*, 1863, at &c., did unlawfully aid and abet one *John Fryer*, he being then and there the keeper of a place of public resort, wherein refreshments were sold and consumed, in knowingly suffering prostitutes to meet together and remain in the said place of public resort.

The evidence was conclusive and undisputed as to the presence of numerous prostitutes at the house named on the morning in question, as to their continuous presence at the house on that morning, and as to the consumption of refreshments at the same time and place. It was sworn that *John Fryer* was keeper of the house, and this was undisputed.

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The respondent was head waiter or manager for *John Fryer* on the morning in question at the house, and his attention was specially called by the police to the number of the prostitutes on the premises. *John Fryer* was not present at the said time and place. There were at the time named warrants for *John Fryer's* apprehension in force from the Police Court, for non-appearance to summonses to answer charges for suffering prostitutes to assemble at his said house, contrary to 2 & 3 *Vict. c. 47. s. 44.*

The magistrate was of opinion that the relation of servant and master was proved to exist between the respondent and *John Fryer*, but that such relation was insufficient to establish in point of law an aiding and abetting according to the true meaning and intent of 11 & 12 *Vict. c. 43. s. 5.*, and refused to convict.

The question of law for the opinion of the Court was, Whether the respondent was an aider and abettor of *John Fryer*, the keeper of a place of public resort wherein refreshments were sold and consumed, in knowingly suffering prostitutes to meet together and remain therein.

Keane, for the appellant.—Stat. 2 & 3 *Vict. c. 47. s. 44.*, after reciting that “it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort,” enacts, “every person who shall have or keep any house, shop, room, or place of public resort within the metropolitan police district, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, (whether the same shall be kept or

retailed therein or procured elsewhere,) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, &c., or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than 5*l.* &c." And by stat. 11 & 12 *Vict. c.* 43. *s.* 5., "every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed." Here the keeper of a place of public resort keeps out of the way to avoid the police, leaving the respondent, who is his servant, to manage the business in his absence. The respondent allows prostitutes to assemble in violation of the first statute, and thereby becomes an aider and abettor of his master within the second. [*Blackburn J.* There is evidence enough to shew that the respondent was aider and abettor of the master, but the magistrate has not found as a fact that he was. *Crompton J.* The conduct of the respondent rather goes to prove that he was a principal offender. *Mellor J.* By statute the person managing a bawdy-house may be treated as a prin-

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No Counsel appeared for the respondent.

CROMPTON J. I have no hesitation in saying that, if the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of the statute 2 & 3 *Vict. c. 47. s. 44.*, and the servant does so, the master is guilty of an offence within that Act, and the servant is guilty as aiding and abetting him within 11 & 12 *Vict. c. 43. s. 5.* And I further think that, under the circumstances of this case, there was evidence of that; but the magistrate has stopped short of drawing the inference that such was the fact, and we cannot draw it for him. This expression of our opinion will, however, be sufficient for the guidance of magistrates in future, so that the case need not be sent back for restatement.

BLACKBURN and MELLOR JJ. concurred.

Appeal dismissed, without costs.

(a) 25 *G. 2. c. 36. s. 8.*

(b) 12 & 13 *Vict. c. 92. s. 3.*

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FOWKES and another, executors &c., *against* The
MANCHESTER AND LONDON LIFE ASSURANCE
AND LOAN ASSOCIATION.

Friday,
May 1st.

Insurance.
Life policy.
Declaration.
Misrepresentation.

A life policy of insurance was entered into with a Company on the life of *H. F.*, which was founded on a written declaration of the assured agreed to be the basis of the contract between the parties, and contained a proviso that "if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever, or if the said *H. F.* should go to any place beyond the limits of *Europe*, &c., the policy should be void, and all monies paid in respect thereof should be forfeited to the said Association." The proposal and declaration contained the usual particulars, and proceeded as follows: "I do hereby declare that the above written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and *The Manchester and London Life Assurance Association*, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void." Held, that the policy and declaration must be read together, and so reading them the policy was not avoided by an untrue statement in the declaration, unless *designedly* untrue.

DECLARATION by the plaintiffs, as executors of *Henry Fowkes*, deceased, stated that, by a policy of assurance, bearing date the 31st *December*, A. D. 1860, made and granted by the defendants, and duly signed and sealed as by law required; after reciting that *Henry Fowkes* had proposed to effect an assurance with the defendants in the sum of 1000*l.* upon his own life for the whole continuance thereof, and that he had delivered to them a declaration therein mentioned and described, which declaration he had agreed should be the basis of the contract between him and the defendants, and that *Henry Fowkes* had paid to the defendants the sum of 43*l.* 8*s.* 4*d.* as premium for that insurance until the 1st

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January, 1862: It was by the policy witnessed and declared that if *Henry Fowkes* should die before or upon the 1st *January, 1862*; or live beyond such day, and he or his assigns should, on or before that day, and on or before the 1st *January* in every succeeding year during the continuance of that assurance, pay, at the office of the Association at which that policy was effected, or within thirty days thereof, the premium of 43*l.* 8*s.* 4*d.*, then the property of the Association should be liable according to the provisions of the deed or deeds of settlement of the Association, but not otherwise, to pay to the executors, administrators or assigns of *Henry Fowkes*, within three calendar months after satisfactory proof of his death should have been received at the office of the Association at which that policy was effected, the sum of 1000*l.*, and such further sum or sums as, having under the provisions of such deed or deeds been apportioned as a bonus to the policy, should have been added to the sum thereby assured, unless an equivalent for such further sum or sums should have been paid or allowed to the party entitled thereto. Provided always that if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy made should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever; or if *Henry Fowkes* should go to any place beyond the limits of *Europe*, except *Madeira, Canada, Australia, New Zealand, The Cape of Good Hope*, or any other place distant not less than 35 degrees from the equator, but as regards those excepted places, only if, in going thereto or therefrom, he

should go only as passenger in time of peace in decked and seaworthy vessels within those limits; or if, being or becoming a military, naval, or preventive service man, he should enter into actual service without the previous licence of a board of directors of the Association (except for the exclusive purpose of defending the country from actual invasion); or if he should commit suicide or die by duelling or by the hands of justice, the policy should be void, and all moneys paid in respect thereof should be forfeited to the Association; but in case of such death by suicide, duelling, or by the hands of justice (subject as therein mentioned). Provided nevertheless that the capital stock and other the property of the Association, remaining at the time of any claim and demand made, unapplied and undisposed of and inapplicable to prior claims and demands in pursuance of such deed or deeds, should alone be liable to make good all claims and demands upon the Association in respect of the policy, and all other policies then present and future, and instruments securing annuities. Averment that the declaration above and in the policy mentioned and referred to was in the words following, that is to say.

“ Life Proposal and Declaration.

“ *Manchester and London Life Assurance Association.*

“ *Manchester, 77, King Street.*

“ Proposed the 26th day of Dec. 1860.	} £1000 at 4l. 6s. 10d. per cent. yearly.
“ Accepted the 2d day of Jan. 1861.	

“ *John F. Hibbert,*

“ *Chairman.*”

Then followed the usual particulars of name, residence,

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age, state of health, habits, &c.
 following

“Declaration

“I do hereby declare that the
 lars are correct and true throug
 agree that this proposal and declar
 of the contract between me and *T*
don Life Assurance Association; s
 appear that any fraudulent conc
 untrue statement be contained
 money which shall have been p
 assurance made in consequence h
 and the policy granted in respect
 be absolutely null and void.

“Signed by me this 26th da

(Signatu

The usual averments followed,
Henry Fowkes; and the plaintiff
 1100/.

First plea. That the declarati
 was a declaration made and sig
 and that, at the time of the mak
 the delivering of the declaration i
 and at the time of the making of
 divers statements made by *Henry*
 ration which were untrue, and t
 ticulars in the declaration alleg
 true were incorrect and untrue, t
 of the proviso in that behalf, the
 void.

Demurrer, and joinder therein.

On the argument of the demu
 there was also a plea alleging th

ments made by *Henry Fowkes* in the declaration were designedly untrue, upon which issue was taken; and that on the trial of that and other issues before *Cockburn* C. J., at the *London* Sittings after *Michaelmas* Term, 1862, the jury found a verdict for the plaintiffs.

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Karslake (*Huddleston* and *Prentice* with him), in support of the demurrer.—The plea amounts to this, that any statement in the declaration, incorporated in the policy, though not material, and though accidentally and not designedly untrue, vitiates the policy. But reading the policy and the declaration as the language of the insurers, that is not the right construction of the contract. In *Anderson v. Fitzgerald* (a) Lord *St. Leonard's* said that, if there was any ambiguity in a life policy, it must be taken more strongly against the person who prepared it. The latter words of that declaration shew that the assured does not warrant the accuracy and absolute truth of every statement, but that the particulars shall be accurate and true in the sense that there is no "fraudulent concealment, or designedly untrue statement:" otherwise those words are surplusage.

Mellish (*T. Jones* with him), contra.—If the assured, in answer to the questions put to him in the proposal, makes any untrue statement which the Company consider material, the policy is avoided, though that statement be not untrue to the knowledge of the assured. The contract between the parties is contained in the policy, and the proviso is "that if any statement in the declaration, which declaration shall be considered as much a part of the policy as if it had actually been set forth therein, is untrue," not "knowingly or designedly un-

(a) 4 H. L. C. 484. 507.

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true," "the policy shall be void." In *Duckett v. Williams* (a), where it was agreed that, if any untrue averment was contained in the declaration, or if the facts required to be set forth in the proposal were not truly stated, all moneys paid upon account of the assurance should be forfeited and the assurance be void, it was held that a misstatement, ignorantly and innocently made, was untrue within the meaning of the policy. In *Cazenove v. The British Equitable Assurance Company* (b) one of the conditions was, that the policy should be void in case any fraudulent or untrue statement was contained in any of the documents addressed to or deposited with the Company, and it was held that an untrue statement of an immaterial fact without intentional fraud avoided the policy. In *Anderson v. Fitzgerald* (c) the proviso, that the policy should be void and the moneys paid should be forfeited, is thus described by Parke B., in delivering the opinion of the Judges, p. 497 :—"The proviso in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the Company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and, lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute

(a) 2 C. & M. 348.

(b) 6 C. B. N. S. 437.

(c) 4 H. L. C. 484.

whether the particular matter to which it related was material or not (which in the case of a dispute a jury would have to decide), leaving the Company to determine entirely for itself what matters it deems material and what not." The policy in the present case only refers to the declaration by way of parenthesis, and therefore, if there is a variance between them, the policy must prevail.

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Karslake, in reply.—The declaration must be read as part of the policy. In *Anderson v. Fitzgerald* (a) the sole question was whether there had been a misdirection in leaving to the jury to say whether the answers to certain questions were material as well as false;—no judicial construction was put upon the word "false." Lord *St. Leonard's* said, p. 513 :—"I think that your Lordships, and every Court of Justice, should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, that that very important branch of insurance, life-insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any Company without having an attorney at his elbow to tell him what the true construction of the document is." His Lordship thought, p. 512, that the word "false," in connection with fraud, meant that which was wilfully false. In *Cazenove v. The British Equitable*

(a) 4 H. L. C. 484.

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Assurance Company (a) the word "untrue" was super-added to "fraudulent." [Cockburn C. J. The materiality of the matters inquired into may affect the question of the truth of the answer, as if the assured was asked the age of his father, and he answered that he was forty years old when he was forty years and four months. *Blackburn J.* An answer substantially, though not accurately, correct would be true.]

COCKBURN C. J. I am of opinion that our judgment ought to be for the plaintiffs.

In the first place we have to see what is the effect of the declaration which the parties have agreed should be the basis of the contract. The declaration is that the particulars given in answer to the questions propounded by the Company "are correct and true throughout;" that the proposal and declaration shall be the basis of the contract; "and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void." It is sought, on the part of the defendants, to construe this declaration in the disjunctive, so that, not only if any fraudulent concealment or designedly untrue statement is contained in the answers to the questions, the policy is to be void and the premiums forfeited, but that if any incorrect or untrue statement, however honestly and sincerely made in the belief of its truth, occur in those answers, the same consequences are to follow. The first observation in answer is that, upon that construction, the clause which relates

(a) 6 C. B. N. S. 437.

to fraudulent concealment and designedly untrue statement is superfluous and unnecessary, because it is only a reiteration in extenso of that which is involved in the former clause which requires the particulars to be correct and true. In construing an instrument prepared by the Company and submitted by them to the party effecting the insurance for his signature, it ought to be read most strongly contra proferentes; and inasmuch as, upon the construction contended for, the latter clause is wholly unnecessary, I think we ought to construe that clause as merely explanatory of what is meant by the terms "correct" and "true" in the former clause. A layman about to effect an insurance would read such a document, when submitted to him for his signature, in the following sense:—"I agree that my answers to the questions propounded to me by the Company shall be the basis of the contract between us; that is to say, if I am guilty of any fraudulent concealment or designedly untrue statement in those answers, the policy shall be null and void, and not only that, but the premiums shall be forfeited." Then it is said that, if we turn from the declaration to the policy, we shall find that the language of the policy varies from the declaration; and it is argued that the policy is the true statement of the contract between the parties. But the declaration is declared to be as much a part of the policy as if it had been set forth therein; and the language of the policy is that if any statement in the declaration is "untrue" the policy shall be void and all moneys paid in respect thereof be forfeited. To ascertain the meaning of the words "if any statement in the declaration is untrue" we must refer to the declaration itself, which is made the basis of the contract; and reading those words with the light thrown upon them by the language in the declaration,

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I think the true construction of the language of the defendants is, that in order to avoid the policy the statement must be designedly untrue, that is, untrue to the knowledge of the assured. Then it is said that there is another paragraph in the policy, which must be read in connection with the preceding,—“or if the assurance by the policy made should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever,” &c. It appears to me that either that is a reiteration of the language of the declaration, or, if it is more, we must see how we can construe it so as to reconcile it with the declaration; which I think may be done by construing it as referring to any misrepresentation, concealment or false averment made in the course of the negotiations between the party proposing to insure and the insurers. The answers given to the original questions might lead to further questions; and if in answer to them there should be wilful misrepresentation, concealment or false averment, it would be met by this part of the proviso. We may thus read the declaration and the proviso in the policy together so as to make one consistent whole.

In the result I am of opinion that the true construction of the policy and declaration is, that so long as the person proposing to insure makes a statement honestly, which he believes to be true, although it may turn out to be incorrect in fact, the policy is not avoided.

CROMPTON J. I am of the same opinion. The policy and the declaration are declared to be one, as if the declaration was written out in the policy. We must therefore see what is the construction to be put on both instruments; and one assists in construing the other.

It is said that the fulfilment of every stipulation in the policy is a condition precedent to the right of the assured to recover. But the declaration is made the basis of the contract; and therefore the right construction of the declaration is the key to the whole. It is not unimportant to observe that a number of the particulars in the proposal and declaration are not material; therefore, we must see clearly that the parties intended to make it a condition that all these things should be true though immaterial. The parties might have agreed that, if any of the particulars were untrue independently of a wilful or intentional falsehood the policy should be void. But here the latter words in the declaration qualify the former; and it is the same as if it had been agreed that the proposal and declaration should be the basis of the contract, so that, if the person proposing to insure told a wilful untruth, it should vitiate the policy; then the consequences are stated in these words, "all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited." If it had stopped there I should have thought that the parties were looking to the cases in which fraud or no fraud makes a difference as to the return of the premiums; but it goes on, "and the policy granted in respect of such assurance shall be absolutely null and void;"—that is, the assured is made to agree that, if he makes a designedly untrue statement, the policy shall be void; and this clause would mislead if the policy were construed to be void by reason of a statement not designedly untrue. It is said that the declaration is governed by the policy; but I doubt that; because the declaration is made the basis of the contract. I also think that the declaration and the policy may be read together without contradicting each other. The

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proviso in the policy, that if any statement in the declaration be untrue, the policy shall be void, I think means untrue in the sense in which it is used in the document which is made the basis of the contract, that is "designedly untrue." The proviso goes on, "or if the assurance . . . should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever," and then provides for a number of other events happening. There might be other matters misrepresented or concealed, and untrue answers to other questions besides those in the proposal and declaration, which would vitiate the policy. That is the reason for those general words;—the Company carefully avoid limiting the "wilful misrepresentation, concealment or false averment" to the particulars in the proposal and declaration."

I think, therefore, the policy means that if any statement in the declaration was "untrue" in the sense used in that declaration, or if the insurance should have been effected by or through any wilful misrepresentation, concealment or false averment of any matter de hors the declaration, the policy should be void. In this way the word "untrue" has the same sense in the policy and the declaration, and the latter part of the proviso goes farther than the declaration.

BLACKBURN J. I also have come to the conclusion that the plaintiffs are entitled to our judgment; although I was much impressed with the way in which the case was put by Mr. *Mellish*. In policies of insurance there is a distinction between cases in which the assured is prevented from recovering, and those in which the Company are to restore the premiums. When there is a warranty or a contract between the parties

that certain particulars are true, there, unless the compliance with the warranty is absolutely and faithfully accurate, or if there be a fraudulent misrepresentation or concealment of a material fact, (in marine policies it is immaterial whether the misrepresentation or concealment be fraudulent or not), the policy is void ; and then the premiums could be recovered back. But in life policies there is generally a stipulation that the premiums shall not be recovered back, but shall be forfeited ; and then the question is one of construction of the policy. The present is a case of that kind. The proviso in the policy, which says that the declaration shall be considered as much a part of the policy as if it had been set forth therein, is that, if any statement in the declaration is untrue &c., or if any one of certain other specified things happen, the policy shall be void, and all moneys paid in respect thereof shall be forfeited. The question is, what is the meaning of the word "untrue"? *Primâ facie* it means "inaccurate," not necessarily implying anything wilfully false. The question is, whether it is to be taken in that sense ; and that sends us back to the declaration which is embodied in the policy. There are rules of construction which, though they may be cited on both sides, furnish several principles for our guidance ; and one of those rules is, that in all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other. If there is any ambiguous phrase, another rule of construction, which was also known to the Civil law, applies, "*Verba chartarum fortius accipiuntur contra proferentem.*" And if the party who proffers an instrument uses ambiguous words in the hope that the other side will understand them in a particular sense, and that the Court

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which has to construe the inst
different sense, the above rules
be construed in that sense in w
sonable man on the other side
Here we find in the declarati
these words: "I do hereby
written particulars are correc
that is a declaration that th
"And I do hereby agree the
claration shall be the basis o
me and *The Manchester and
Association:*" that makes the
Then it goes on. "And if it s
any fraudulent concealment or
ment be contained therein," th
feited and the policy be void.
reading this declaration would
ning of the last clause as poin
of an untrue statement, just as
if it shall hereafter appear &c.'
I think another ordinary rule
est exclusio alterius," or as it is
facit cessare tacitum." The
dulent concealment and desig
fairly lead to the constructio
parts with the implied tacit ag
particulars should vitiate the p
that, if there were a designedl
policy should be void, and not
we bring the declaration so un
we must construe the word "I
the same sense as in the decl
with the ingenious argument of
the declaration was signed fir

between the parties, and that the policy may have a different meaning from the declaration, and go farther than it does. That would give insurance Companies the power of cheating persons. The proviso and the declaration must be read together, and then the effect of the declaration is to limit the word "untrue" to the sense "wilfully false."

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MELLOR J. I confess that, at one time, I thought that the policy would be vitiated by an untruth in the particulars required by the Company, though it would require a designedly untrue statement in them to create a forfeiture of the premiums. But, upon full consideration, I have come to the conclusion that the true construction of the policy is in favour of the plaintiffs. The proviso avoids the policy and declares the premiums forfeited on the happening of any of these three different matters: first, if any statement in the declaration is untrue; secondly, if the assurance has been effected through any wilful misrepresentation, concealment or false averment; thirdly, in case the assured shall go to any place beyond the limits of *Europe*, except &c. And when we come to read the declaration and the policy together, and inquire what is the meaning of the word "untrue," we find that the proviso for avoiding the policy, on the happening of these matters, itself refers to and incorporates the declaration as the basis of the contract between the parties: and, as my brother *Blackburn* said, the declaration would mislead a person unless the policy is construed to mean that the untrue statement which is to vitiate it and cause a forfeiture of the premiums must be a designedly untrue statement; because, at the conclusion of the declaration, those are

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the consequences which are to follow upon a fraudulent concealment or designedly untrue statement. The distinction between the policy and the declaration which was suggested by Mr. Mellish, and with which I was at first impressed, does not in reality exist; and therefore I agree with my Lord and my brothers that our judgment should be given for the plaintiffs.

Judgment for the plaintiffs.

THE
MAY 1863

COOPER *against* ASPREY.

THE
MAY 1863

Sheriff's officers went to the house of a party to execute a writ of fieri facias and took possession of his goods. An auctioneer and others obtained them under a writ of sale, and proceeded to sell them notwithstanding the resistance of the officers, whom they treated with considerable violence: whereupon the sheriff took out an interpleader summons and served it. They disregarded this and completed the sale and removed the goods: held a contempt of Court, both as common law and under the Interpleader Act 1 & 2 W. 4 c. 56.

THIS was a rule calling on *Stephen James Green* and others to shew cause why a writ of attachment should not issue against them for contempt in obstructing the sheriff of *Middlesex* in the execution of his duty under a writ of fieri facias in this cause, and forcibly removing and causing to be removed out of the custody of the sheriff goods seized by him in the execution of his duty.

On the 13th *April*, 1863, a writ of fieri facias at the suit of the plaintiff was sued out against the goods of the defendant, and a warrant to execute it issued by the sheriff. The sheriff's officers came to the house of the defendant to execute the warrant, seized the goods, and left a man in possession that night. *Green*, who was an auctioneer, and the other parties to this rule, were found in the house, who claimed the goods under

a bill of sale from the defendant, and sold them the next day, notwithstanding the resistance of the officers, whom they treated with considerable violence. The sheriff obtained an interpleader summons, which was served on the parties while the sale was going on, but they disregarded the summons, and had the goods removed the same day. They, however, afterwards attended the hearing of the summons, and declared their readiness to obey the order of the Court.

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Day shewed cause.—In resisting the sheriff's officers these parties only exercised a legal right. Every man's house is as his castle, *Semayne's Case* (a); and he has a right to resist the seizure of his goods by any person, be he sheriff or other, unless he shews some lawful authority to seize those particular goods. Here the goods, having passed by the bill of sale, were no longer the goods of the defendant, against whom the writ of fieri facias was issued. An interpleader summons having been taken out makes no difference. *Day v. Carr* (b) is an authority in point. There a bailiff seized under a fieri facias goods of the defendant at his premises. He found the property was advertised for sale on the following morning by A., whereupon the bailiff informed A.'s servants of the seizure, and left men in possession. A. then served the bailiff with notice that the goods were his, and required the sheriff to withdraw from possession. The sheriff obtained an interpleader summons, which was served on A. the next morning, who on the same day proceeded with the sale and removed the property, notwithstanding the opposition of the officers in possession. It appearing that the property

(a) 5 Co. 91 a. b.

(b) 7 E. 883.

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seized had been assigned by wa
 a security for money lent, with
 default, and that he had taken
 the Court refused to issue an at
 rescuing and carrying away t
 parties here attended on the in
 declared their willingness to ob

Quain, who appeared to su
 called on.

COCKBURN C. J. This rule
 Independently of the fact of a
 having been issued, the resistan
 officers amounted to a contempt
 called on to determine whether
A. or to *B.*, we have only to se
 them, the sheriff was acting bor
 stances like the present, goods i
 sheriff are in the custody of tl
 taking them with a strong hand
 guilty of a contempt of Court.
 more emphatically to cases whe
 mons has been taken out by tl
 having the question in dispute p

The case of *Day v. Carr* (a) ha
 sition to the rule, and seems in p
 may regret that this Court shoul
 the Court of Exchequer, I am bc
 assent to the doctrine there laid c
 bounden duty to protect our offic

(a) 7 *Exch.* 8

execution of our process, he encounters resistance and violence.

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The rule must therefore be made absolute, but it may remain in the office for a time, to afford the parties an opportunity of bringing into Court the money in their hands which has been realised by the sale of the goods.

CROMPTON J. I am of the same opinion. Had it not been for *Day v. Carr (a)*, I should have had a strong opinion in accordance with that of my Lord Chief Justice. I do not see why the sheriff should not be in the same position as a messenger in bankruptcy, whose authority is dependent on the validity of the proceedings. In *Ex parte Page (b)* Lord Eldon is express on this subject:—"This is a warrant to enter the house, and seize the effects, of the bankrupt; and, supposing it to be my order, the person, executing it, is to seize the property of the bankrupt, not of any other person; and is to do that at his own hazard: yet Lord Hardwicke laid down what has been acted upon ever since, that, if the person, executing the process, enters a house, and seizes property, not belonging to the bankrupt, making that entry and seizure under colour and by virtue of that authority, he cannot *brevi manu* be turned out." I always thought, even before the Interpleader Act, 1 & 2 W. 4. c. 58., that goods in the custody of the sheriff were in the custody of the law, and, independently of that statute, it is right in us to uphold our own authority. The persons now before us make a claim to these goods. The sheriff takes out an interpleader summons to bring the parties before a Judge and make them interplead, if necessary. The execution creditor has then the power of interpleading, and is entitled to

(a) 7 Exch. 883.

(b) 17 Ves. 59, 61.

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have the goods sold, or security given for them; and it appears to me that, if either of the parties intentionally takes those goods out of the hands of the officers, it is obstructing the process of the Court and the law which the Legislature has directed them to administer, and that the opposite party ought to be put in the same situation as if no such thing had been done. The writ may remain in the office, but not long, for the goods may be made away with in the meantime.

BLACKBURN J. Had it not been for the case of *Day v. Carr (a)*, I should at once have thought the officers entitled to the protection they seek. I am clear that, on this interpleader process, there was a complete contempt. The Interpleader Act, 1 & 2 W. 4. c. 58., says that when goods taken in execution are claimed, the Court may bring the execution creditor and the claimant before them, and protect the sheriff against both, and may decide that the goods be delivered to either party. In order to exercise this jurisdiction it is necessary that the Court should have control over the fund. Suppose it were ultimately determined that the claimant had no right to the goods, and therefore that the money realised by the sale of them should be paid to the execution creditor; here the claimant has carried off the goods after an interpleader summons had been served on him to state and support his claim, and abide the order of the Court. If such an interference with the execution of its process is not a contempt of Court, I know not what is.

As to *Day v. Carr (a)*, I do not clearly see on what ground the Court of Exchequer proceeded; but they seem to have considered that the goods were no longer

(a) 7 Exch. 883.

in the hands of the sheriff. On the facts I should have thought the party had committed a gross contempt of the Court; but all the Judges are reported to say that they must deal with the case as if the Interpleader Act had not passed. There may have been something in that case, which the reporter has omitted, to shew that the Interpleader Act had no bearing upon it.

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MELLOR J. I am of the same opinion. I cannot understand on what ground the Court of Exchequer proceeded in *Day v. Carr (a)*. But we cannot tolerate that persons who claim goods seized in execution under a fieri facias, shall be at liberty to say "I will carry them off under a bill of sale,"—it is a thing which ought not to be allowed to take place in a civilised community.

The other circumstance, namely, that an interpleader summons had been issued before the sale, renders their conduct à fortiori a contempt. For the goods having been seized, process of the Court invoked, and its protection claimed by the sheriff, it is a vague thing in these parties to say "We yield to the authority of the Court." Theirs is a strange way of yielding.

Quain mentioned that in a case of *Lester v. Fletcher*, in which *Lush* and *Field* were counsel, the Court of Common Pleas disapproved of *Day v. Carr (a)*. He also referred to The Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126. s. 16.

Rule absolute. The writ to lie in the office until the 15th May.

(a) 7 Exch. 883.

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Tuesday,
May 5th.

LANYON against SMITH.

*Mining Com-
pany.
Cost book
system.
Winding up
Company.
Contributory.
Joint Stock
Companies
Acts, 1856,
1857, 1858,
19 & 20 Vict.
c. 47., 20 & 21
Vict. c. 14.,
21 & 22 Vict.
c. 60.
Vice Warden
of Stannaries
Court.
Staying pro-
ceedings.*

1. In an action against a shareholder in a Company working a mine on the cost book system for goods supplied to the Company, it appeared that after the defendant had parted with his shares in it, the remaining members of the Company caused it to be registered under the Joint Stock Companies Act, 21 & 22 Vict. c. 60., and an order was made by the Court of the Vice Warden of the Stannaries to wind up the Company, and stay all actions by creditors against it, and a list of contributories was drawn up, in which the name of the defendant was included. On an application to stay the action: held, that the plaintiff had a right to proceed, and that the Court of the Vice Warden had no power to make that order, as the defendant was not a member of the registered Company, and the debt sued for was not a debt of that Company.

2. *Quere*, per Blackburn J., if instead of the Company having been registered under stat. 21 & 22 Vict. c. 60., it had been registered under stats. 19 & 20 Vict. c. 47., 20 & 21 Vict. c. 14.?

THIS action, commenced on the 9th March, 1863, was brought against the defendant, as shareholder in *The New Wheal Vor Adventurers Company* to recover 518*l.* 0*s.* 2*d.*, the balance due on goods supplied to that Company by the plaintiff, trading as *The Cornish Cartridge Company*.

In March, 1857, the defendant became a shareholder in the Company in question, being a Company carried on upon the cost book principle, and the goods in respect of which the action was brought were supplied to it between January 22d, 1859, and November 22d, 1861. Previous to October, 1861, the defendant disposed absolutely of his shares. On the 5th November, 1861, the Company, then consisting of more than seven members, caused it to be registered under The Joint Stock Companies Acts, 1856, 1857 and 1858, 19 & 20 Vict. c. 47., 20 & 21 Vict. c. 14., and 21 & 22 Vict. c. 60., for the purpose, as was suggested, of its being wound

up; and by an order of the Court of the Vice Warden of the Stannaries of *Cornwall* of the 8th *April*, 1862, it was ordered to be wound up, and all suits or actions by creditors against it stayed. A list of contributories was drawn up by the official liquidator of that Court, on which the name of the defendant was placed on the 9th *April*, 1862; but the winding up proceeded, and the list remained open for correction.

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Under these circumstances, *Mellor J.*, on the application of the defendant, made, on the 17th *April*, 1863, an order, under stat. 21 & 22 *Vict. c. 60. s. 6.*, to stay proceedings in the action.

Karslake moved for a rule to rescind the order.—The defendant is liable for the debts of the *cost book Company*, but never having been a shareholder in the *registered Company*, he is not liable for its debts. The order of the Stannaries Court was only to wind up the registered, not the cost book, Company. [He cited *In re The Welsh Potosi Mining Company, Ex parte Loft-house (a)*, and *The Same Case, Ex parte Birch (b)*, before the Lord Chancellor and the Lords Justices, decided on 19 & 20 *Vict. c. 47.*; and *In re The Welsh Potosi Mining Company (c)*, before *Kindersley V. C.*]

Montague Smith and *A. Rogers* shewed cause in the first instance.—The defendant cannot be sued for this debt. He is proceeded against as member of a Company which is being wound up under stat. 21 & 22 *Vict. c. 60.*, amending and extending the previous stats. 19 & 20 *Vict. c. 47.*, and 20 & 21 *Vict. c. 14.*, for a debt due to the Com-

(a) 2 *De G. & Jones*, 69.(b) 2 *De G. & Jones*, 10.(c) 27 *L. J. Chanc.* 311; 4 *Jur. N. S.* 577.

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pany. His name has been put on the list of contributories to that Company, under stat. 19 & 20 *Vict. c. 47. s. 65.*, by the Court of the Vice Warden, which had competent jurisdiction for the purpose. [*Blackburn J.* The defendant was not one of the seven persons by whom the Company was registered. How then do you make him out a member of it?] Stat. 20 & 21 *Vict. c. 14. s. 29.* enacts, "Every Company consisting of seven or more shareholders, having a capital of fixed amount, divided into shares, also of fixed amount, duly constituted by law prior to the passing of this Act, and not being a Company hereby required to be registered, may at any time hereafter, upon compliance with the provisions of The Joint Stock Companies Acts, 1856, 1857, register itself as a Company under such Acts, &c." [*Blackburn J.* The defendant not having been a member of the Company at the time of registration had no power to assent to it.] Having been once member he had no power to *dissent*; 19 & 20 *Vict. c. 47. s. 62.* The creditors of a Company working a mine have a lien upon it, which would be lost if registration were to make the Company a new one. Stats. 11 & 12 *Vict. c. 45.* and 12 & 13 *Vict. c. 108.* support the defendant's case. [*Blackburn J.* In the note (c) to the 2d ed. of *Chitty's Statutes*, by *Welsby & Beavan*, vol. 1, p. 680, it is said, "A mining Company on the 'cost book' system, formed before the passing of this Act" (11 & 12 *Vict. c. 45.*) "is not within its operation," citing *In re The Wheall Lovell Mining Company, Ex parte Wyld*, 1 *Hall & Twells*, 125, 1 *Mac. & G.* 1.] That was a peculiar case. [They cited *Ex parte Stevenson, In re The Liverpool Tradesman's Loan Company (a).*] [*Crompton J.* Is there any provision as to how stat.

(a) 32 *L. J. Ch.* 96.

21 & 22 *Vict. c. 60. s. 6.* is to be carried out? Cannot this matter be pleaded? It would be far better if it can.] The practice has been to apply at Chambers for an order, which only suspends the action. [*Cockburn C. J.* The objection to our disposing of it on summary application is, that if we are wrong there is no appeal from our decision.]

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Karslake and *J. C. Mathew*, in support of the rule, urged that the plaintiff had no remedy against the Company, and was therefore entitled to sue the defendant. [They referred to 19 & 20 *Vict. c. 47. sects. 16. 19. 59—66. 111, clause 3, and 116, and Schedule, Table B.*

COCKBURN C. J. We have considered this case, and think that the rule should be made absolute. The defendant is sued in respect of a debt incurred in the working of a mine carried on upon the cost book principle, in which he was a partner. This having been a common law partnership, the defendant, as one of the partners, continues liable for the debts of the Company, although his shares have been parted with, unless he is entitled to the benefit of the provision in stat. 21 & 22 *Vict. c. 60. s. 6.*; whereby it is provided that whenever a Company is being wound up under that statute, no suit, action, or other legal proceeding in respect of a debt of the Company shall be brought against it, or its public officer, or any member of it, except with the leave of the Court. The defendant claims the immunity given by this enactment, and that raises the question for our decision, — whether the act of the

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Court of the Vice Warden of the Stannaries, which has made him contributory to this registered Company (the original cost book Company having been registered and so converted into a Company capable of being wound up), was within the jurisdiction of that tribunal.

Now, the provision in the statute in question has reference to a person sued as being a member of a Company in respect of a debt of the Company. The question therefore presents itself whether the defendant was a member of this Company, and the debt a debt of the Company. On both points, not only is the affirmative not made out, but the negative is made out.

The defendant, having been partner in the mine when it was conducted on the cost book principle, parted with his shares in it absolutely. Subsequently certain persons who were still interested in the mine caused the Company to be registered under the Joint Stock Companies Act, mainly, I think (although this is not material), in order to have the concerns of the mine wound up. The Company thus registered consisted of a certain number of persons, of whom the defendant was *not* one. He had entirely parted with his interest in the mine. He was no party to those proceedings which are conditions precedent to the registration of a joint stock Company, and therefore I cannot see how in any point of view he can be considered a member of it. Then the debt for which he is sued is a debt incurred, not by a registered Company, but by the Company which existed previously to its being converted into a joint stock Company, and consequently the debt on which the action is brought is not a debt of the latter

Company. It is true the Vice Warden of the Stannaries Court has thought proper to place the defendant on the list of contributories to it, probably by no means against his will. The defendant seems to have got rid of his shares when he thought it for his convenience, and when he found he had not got rid of liability for the debts of the old Company, desired to be put down as contributory to the new Company, in order to get rid of that liability. But it is not necessary to go into this part of the case. It is enough to say that the defendant is not a member of the registered Company, and the debt sued for is not a debt of that Company, and that the Court of the Vice Warden, in putting him down as contributory to that Company, did what was altogether beyond its power, and consequently that the plaintiff is not deprived of his right to sue the defendant. And this construction is strongly confirmed by sect. 116 of stat. 19 & 20 *Vict. c. 47*.

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CROMPTON J. I have arrived at the same conclusion. The defendant does not bring himself within sect. 6 of stat. 21 & 22 *Vict. c. 60*. In order to do that he must shew that he is member of the registered Company, and he has not done it. The plaintiff has a clear right to sue him and the other members of the cost book mining Company; and, unless some power has been exercised to take away that right, it cannot be affected by what was done with the Company. The Court of the Vice Warden has, it is true, adjudicated the defendant a shareholder in the registered Company, and put him down on the list of its contributories. It seems, indeed, that the list is still open for correction, but, be that as it may, the plaintiff cannot be affected by the above adjudication.

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Then we have the decision of the Lord Chancellor and the Lords Justices in the case of *The Welsh Potosi Mining Company (a)*, which is precisely in point, and proceeds, as I understand it, on the ground that, when a member of a cost book Company has been rid of it for a certain time, if the Company afterwards comes in to be registered, it is the old Company minus that party: so that the cost book Company here never came in to be registered while the defendant was member of it.

The case of *Ex parte Stevenson in re The Liverpool Tradesman's Loan Company (b)* was relied on by the defendant's counsel. That was the case of a joint stock Company, registered under one statute, which converted itself into a Company under another. There, however, the whole body of the original Company came in for registration, so that the old and new Company might be considered as identical.

BLACKBURN J. As at present advised, I think the defendant's case fails on both the grounds which have been mentioned by my Lord Chief Justice. This Company is being wound up by virtue of an order made under the recent statute 21 & 22 Vict. c. 60. s. 6. What the case might have been if it had arisen under the Joint Stock Companies Acts, 1856 and 1857, 19 & 20 Vict. c. 47., 20 & 21 Vict. c. 14., we need not consider.

Stat. 19 & 20 Vict. c. 47., to which the present Act, 21 & 22 Vict. c. 60. is supplemental, provides for the winding up of Companies. The Companies to which the former refers are registered Companies, and the mode of proceeding is given in sect. 3, as follows: [His Lordship read the section] Here

(a) 2 De G. & Jones, 10 and 69.

(b) 32 L. J. Ch. 96.

it appears that, on the 5th *November*, 1861, the then members of the cost book Company, consisting of more than seven persons, subscribed the necessary memorandum, and caused themselves to be registered as and thereby became an incorporated Joint Stock Company. Now was the defendant a member of that Company, and was the debt contracted a debt due to that Company? It seems not. A Company conducted on the cost book principle is but a partnership at common law; and consequently, when this Company contracted debts, the defendant, as a member of it, became liable for them. When he ceased to be a member of the Company he did not get rid of the common law liability, but he did arrange that he should not be liable for any future debts of the Company, which was carrying on business as a Company not containing his name. I wish to point attention to this,—the surviving members were carrying on a new partnership, and if sued they could not have pleaded in abatement the absence of the defendant; and any member of it that came in afterwards could not be liable for debts contracted in his time.

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If this question were now raised for the first time I would go through the statutes more fully. But that is not necessary, for it has been done at very considerable length by the Lord Chancellor and the Lords Justices in *Re The Welsh Potosi Mining Company, Ex parte Lofthouse (a)*. That case is precisely in point, and, I think, would be binding upon us, being the decision of a Court of error. But even without it I should of myself come to the same conclusion.

MELLOR J. When this case was before me at Cham-

(a) 2 *De G. & Jones*, 69.

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bers, the facts stated were different from those now before us. It appeared from the affidavit of the defendant that he was a shareholder in the Company and that there was an order of the Vice Warden's Court to wind it up. I thought I ought to give credit to that order as being made in accordance with the statute.

I am now satisfied that we ought to discharge the order. The case does not come within sect. 6 of stat. 21 & 22 *Vict. c. 60.*, seeing that the defendant is not a member of the existing Company. Stat. 19 & 20 *Vict. c. 47.* shews what is necessary to be done by persons who wish to bring themselves under it, *i. e.*, they must associate themselves together to form a Company. The debt here sued for was contracted some time before any attempt was made to register this Company, and the defendant is therefore not liable to that debt, for he had got rid of his shares in the Company. Looking at sect. 19 of that statute it appears to me that in order to bring a person within its operation, he must either have accepted shares in a Company registered under the Act, or subscribed the original memorandum of association.

Then, however, it may be said sects. 59, 61-3, 65 of that Act extend the liability of persons who were members of a Joint Stock Company under it, and that such persons continue liable for three years after they have ceased to be members. But looking at all these sections, and the definition of shareholders in sect. 65 as to who are to be contributories, *i. e.*, "*existing or former shareholders,*" it appears to me that the only persons who can be made contributories are shareholders in the registered Company, as distinguished from those in the unregistered

one. Mr. *Smith* and Mr. *Rogers* argue that there was identity between the cost book Company and the registered Company, and that the defendant still remained a shareholder in the latter to bring him within this Act; I do not think so. I think that, having parted with his shares and not having been a party to the registration, he remains liable as at common law.

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Rule absolute (a).

(a) See also 20 & 21 *Vict. c. 78.*, and 26 & 27 *Vict. c. 118.*

Ex parte JOHNSON.

Thursday,
April 30th.

1. Stat. 7 & 8 *Vict. c. 101. s. 4.* enacts that, "within twenty-four hours after the adjudication and making of any order" in bastardy, the putative father may give notice of appeal to the Quarter Sessions: Held, that this time must be counted from the oral adjudication of the justices in petty Sessions, and not from the time when the formal order is signed by them; overruling *Reg. v. The Justices of Flintshire*, 15 *L. J. M. C.* 50; 10 *Jur.* 475.

2. *Quære*, whether the formal order must be signed by all the justices at the same time?

3. *Quære*, whether a verbal notice of appeal is sufficient under this section?

Practices at Sessions.
Bastardy order.
Time for appeal.
Verbal notice of.
7 & 8 *Vict. c. 101. s. 4.*

AT the *Essex* Quarter Sessions for *April*, 1863, on the hearing of an appeal against a bastardy order made under stat. 7 & 8 *Vict. c. 101. s. 3.*, the appellant proceeded to prove his notice of appeal under sect. 4.

On the 17th *February*, the adjudication and order were made orally by the justices in Petty Sessions. An order in conformity with it was afterwards drawn up as of the 17th *February*, which on the 1st *March* was signed by one of the justices who took part in the adjudication, and by the others on the 3rd. On the 2nd a written notice of appeal was served on the mother, and

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on the 4th the recognizances for costs were entered into by the appellant, and notice thereof given to her.

On this evidence it was objected on the part of the respondent, that the notice of appeal ought to have been given within twenty-four hours after the adjudication was pronounced. Whereupon the appellant proved that a verbal notice of appeal had been given on the 17th *February* immediately after the adjudication.

The Sessions held, upon the authority of *Reg. v. The Justices of Flintshire (a)*, that the order was not made on the 17th *February*, and that the notice of appeal was not good because it had been given before the order was signed by all the justices. They therefore refused to hear the appeal.

Pearce moved for a mandamus to the Sessions to hear the appeal, or for a certiorari to quash the order of Petty Sessions as irregular.—Stat. 7 & 8 *Vict. c. 101 s. 4.* enacts, “If within twenty-four hours after the adjudication and making of any order on the putative father &c. such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the General Quarter Sessions of the peace to be holden after the period of fourteen days next after the making of the said order, &c. The verbal notice of appeal which was given on the day of adjudication is good in itself, but is not available because the recognizances were not entered into within seven days. *Reg. v. The Justices of Flintshire (a)* shews that th

(a) 15 *L. J. M. C.* 50; 10 *Jur.* 475.

twenty-four hours allowed for notice of appeal must be calculated from the signing of the order by the justices; here it was signed by one of them on the 1st *March*, and the written notice of appeal given on the 2nd, and the recognizances were completed within seven days of that date. [Cockburn C. J. Must not all the justices sign the order at the same time? *Reg. v. The Justices of Flintshire* (a) was only the decision of a single Judge sitting in the Bail Court.] That case is an authority in point.

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COCKBURN C. J. There ought to be no rule. I do not at all concur in the ground on which the Sessions proceeded, namely, the assumption that the order was not made on the 17th *February*, 1863. The order must be considered as having been made by the justices at the time of their adjudication; for what is called the order, *i. e.* the written record of adjudication, is merely the evidence of the order which the justices orally pronounced, and although their signatures were attached afterwards, that is to be looked on as done nunc pro tunc. Were this otherwise, it would be impossible for the opposite party ever to know the precise period at which the order was made. And although in this case the rule which I have stated may operate with great harshness on the appellant, who thought the order took effect from the time when the justices signed the written document, that is much less likely to produce confusion than if we were to hold the contrary. This being so, the adjudication and order must be taken as made on the 17th *February*, in which case, although a verbal notice was given (on the sufficiency of which it is not necessary to pronounce an opinion), yet unfortunately

(a) 15 *L. J. M. C.* 50; 10 *Jur.* 475.

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the further requisitions of the statute were postponed till too late a period. That ousts the present applicant of his appeal to the Quarter Sessions, and they were therefore right in refusing to hear it.

Neither do I think that we ought to interfere in the other way suggested, namely, by granting a certiorari to quash the order as irregularly signed. Many convictions and orders of justices are pronounced on one day, and having been drawn up in form by the clerk from minutes made at the time, are signed by the justices at a subsequent period, nunc pro tunc, and the signed order has reference back to the day of adjudication. And although the practice should not be pursued or encouraged more than is absolutely necessary, we cannot say that such a course vitiates the proceedings.

CROMPTON J. This question turns on stat. 7 & 8 Vict. c. 101. s. 4. It is rightly stated in 3 *Chitty's Statutes*, by *Welsby* and *Beavan*, p. 832, note (c), 2nd ed.: "A party may give notice of appeal under this section within twenty-four hours after the order is verbally pronounced by the justices, although it is not formally drawn up and signed by them till afterwards." There cannot be *two* days from which the twenty-four hours notice is to run; for the statute says the notice must be given within twenty-four hours from a certain time, *i. e.*, within twenty-four hours after the adjudication and making of the order. This may be put in three ways. First, Do the twenty-four hours run from the time of making the order? Secondly, Do they run from the time of signing and sealing the order? Thirdly, Or do they run from the service of the order? The Legislature could not have meant them to run from a time of which the

appellant may know nothing, *i. e.*, the time of signing. Then the Courts have sometimes considered that the time should count from the service: but the contrary was held in *Reg. v. The Justices of Derbyshire (a)*. There is another reason why the time here cannot count from the service, namely, because the earlier part of the same section says, that the order for adjourning the hearing at Petty Sessions is to be made "within forty days from the service of the summons." I think, therefore, the real and convenient construction of this section is, that the time must run from the adjudication which the justices make when sitting together in the Court of Petty Sessions. The notice in this case was therefore in proper time, but the recognizances were not, and the Sessions were right in refusing to hear the appeal.

I also think that no certiorari to quash the order ought to issue. There are many things in the nature of records which cannot be disputed or inquired into. In the case of convictions it is constantly the practice to get the conviction drawn up and signed by the convicting magistrates after the Petty Sessions are over, and so long as it is signed in time for the Quarter Sessions it is enough. This is analogous to many things done in our own Courts: for instance, the judgment on which execution issues is never drawn up at the time, but, if required for any formal purpose, is drawn up afterwards from minutes.

I need not enter into the question whether the judicial act here done can be done by different persons at different times.

BLACKBURN J. I am of the same opinion. Before stat. 7 & 8 *Vict. c. 101.*, the practice was well esta-

(a) 7 Q. B. 193.

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(a) 15 *L. J. M. C.* 50

counting the time for appealing from a time of which the party who means to appeal may be ignorant, or from the service of the order, I am forced to the conclusion that it must be counted from the making of the order in Court.

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Rule refused.

RICHENS, appellant, *against* WIGGINS, respondent. *Saturday,
April 25th.*

1. The provision of stat. 3 G. 4. c. 126. ss. 28. 32., which exempts from toll on turnpike roads carriages employed only in carrying manure, and enact that toll shall not be demanded for them "by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure &c., being in or upon any such carriage &c.," is not repealed by stat. 5 & 6 W. 4. c. 18. s. 1., which enacts, that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, (save and except lime,) and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed."
2. A person drove through a turnpike gate a cart laden with garden produce, packed in baskets, paying the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty: Held, that no toll was demandable on account of these baskets being on the cart.
- Turnpikes.
Manure.
Empty baskets.
3 G. 4. c. 126.
s. 28.
5 & 6 W. 4.
c. 18. s. 1.*

THE following special case was stated for the opinion of this Court, under 20 & 21 Vict. c. 43., by the magistrate of the *Hammersmith* Metropolitan Police Court.

The appellant, *Thomas Richens*, of *Isleworth*, market gardener, summoned *Thomas Wiggins*, of *Hammersmith*, Turnpike Gate, toll collector, for unlawfully detaining a sack of the appellant.

One evening the appellant's servant drove through the defendant's gate a cart laden with garden produce packed in baskets, and paid the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty.

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The defendant demanded toll on account of these baskets being on the cart. The servant refused to pay, claiming to be exempt therefrom; whereupon the defendant seized and detained the sack.

The question for the decision of the Court is, whether the toll was or was not payable.

The case set out stats. 3 *G.* 4. c. 126. ss. 32 and 28, and 5 & 6 *W.* 4. c. 18. s. 1., and proceeded:—

For the appellant it was contended that, since the latter Act does not mention the former Act, the provisions of the former Act with respect to the exemption of carriages conveying manure remain in force; but the magistrate thought that, in order to carry out the avowed object of the latter Act, it must be taken to qualify the privilege of the former Act so far as regards the conveyance of articles in addition to and with a load of manure; and he therefore decided that the toll was payable, and dismissed the complaint.

If the Court decides that the toll was not payable, then the defendant is either to restore the sack to the appellant, or to pay him 2*s.* as the value thereof, and is also to pay him 2*s.* as costs.

Lush, for the appellant.—The question depends on the effect of stats. 3 *G.* 4. c. 126. s. 28. and 5 & 6 *W.* 4. c. 18. s. 1. The former, which was passed to amend the general laws for regulating turnpike roads, enacts, “the owner or driver of any waggon, cart, or other carriage laden with manure for land, or materials for any turnpike road or highway, passing through any turnpike gate, or otherwise passing on or across any turnpike road, shall not be liable to pay any toll, nor shall any toll be demanded for such carriage so laden, or the cattle drawing

the same, by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure or materials, being in or upon any such waggon, cart, or other carriage, in addition to such manure or materials, if the loading thereof is substantially manure for land, &c."

By sect. 32, "No toll shall be demanded or taken &c., on any turnpike road, &c., for any horse, beast, or other cattle or carriage employed in carrying or conveying, or having been employed only in carrying or conveying on the same day, any dung, soil, compost, or manure (save and except lime) for improving lands, or any ploughs, harrows, or implements of husbandry (unless laden also with some other thing not hereby exempted from toll.)" The latter Act, made "to exempt carriages carrying manure from toll," after reciting that disputes had arisen as to the exemption from toll for horses or carriages when employed in carrying or conveying manure for improving land, enacts in sect. 1, that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, (save and except lime,) and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed."

The first of these enactments is not repealed by the second. Stat. 3 G. 4. c. 126. s. 28. exempts from toll any load which is substantially composed of manure, although accompanied by baskets or sacks, or spade, shovel or fork "necessary for loading or unloading" it. These latter words must be understood

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with reference to "spade, shovel or fork," and not as applicable to baskets or sacks. Stat. 5 & 6 W. 4. c. 18. s. 1. does not take away the exemption, but extends it to any necessary implements for that purpose. [*Blackburn J.* Manure is often carried in baskets, but "sacks" are also mentioned in the statute. Are they ever used for the purpose? *Crompton J.* Yes, for guano: but that was unknown when the Act passed. *Hayes Serjt.*, contra. Also bone dust.] The repealed stat. 13 G. 3. c. 84. s. 1. enacted that the trustees of turnpike roads might, for the receiving of tolls, erect machines for weighing carts, waggons or carriages "conveying of any goods or merchandise whatever;" and order &c. "all and every or any such carriage or carriages, which shall pass loaded through any such gate or bar, to be weighed, together with the loading thereof." And by stat. 14 G. 3. c. 82. s. 3., also repealed, "no waggon, cart, or carriage, employed only in husbandry, or carrying only manure or lime for the improvement of land, or hay, straw, fodder, or corn unthreshed (excepting hay or straw carried for sale), shall be weighed at any weighing machine now erected or hereafter to be erected; &c." In *Chambers v. Eaves* (a) it was held that a waggon returning from London loaded with dung was not liable to be weighed and charged for overweight under those statutes, by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day. Lord *Ellenborough* there says, pp. 394—5, "If the waggoner's frock were thrown over a waggon loaded with manure, would that render it liable to be weighed? If not, it is not every thing that is carried besides the manure which will subject the owner of

(a) 2 Campb. 393.

the waggon to the additional duty. * * * Can the empty basket and bottles be considered goods and merchandize within the meaning of the Act of Parliament? I think not. Care must be taken that the Act is not evaded; but if the load substantially consists of manure, and manure only, the exemption will not be defeated by an article being tied to the waggon, which cannot be considered as goods and merchandize, and which cannot produce the mischief against which the Legislature meant to provide." [He was then stopped.]

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Hayes Serjt., for the respondent.—The words in stat. 3 G. 4. c. 126. s. 28., "necessary for loading or unloading such manure or materials," override all that goes before, and consequently refer to "basket or baskets, empty sack or sacks." [*Blackburn* J. There is this difficulty in your way. Sect. 26 of stat. 3 G. 4. c. 126. enacts, "in every case in which, under any Act or Acts of parliament relating to any turnpike road, there is an exemption from toll or duty in respect of any horse, mule, ass, ox, waggon, cart, or other carriage, drawing or carrying any dung, mould, marl, or compost, of any nature or kind soever, for improving or manuring the land, &c., such exemption shall be deemed to extend in respect of every such waggon, cart, or other carriage, and also in respect to the cattle drawing the same, going empty or loaded only with implements necessary for more convenient carriage, or loading or unloading such lading, or returning empty, or with such implements as aforesaid, having been so laden, notwithstanding the said waggon, cart, or other carriage shall, for the purpose aforesaid, go to or return from any parish or place in which the said turnpike does not lie." Here, though provision is made

1868. for implements necessary for loading or unloading the
manure, there is no mention of baskets or sacks.] That
section was meant to apply to carriages going empty or
loaded only with the necessary implements. However
this may be, the stat. 5 & 6 W. 4. c. 18. was passed to
define the law and remove the doubts which existed
under the former Act. [*Blackburn J.* Not with that object
alone, as appears from the note (a) to 2 *Chitty's Statutes*,
by *Welsby* and *Beavan*, p. 536, 2nd ed., where several other
Acts are referred to.] At all events that Act drops the
doubtful words "baskets" and "sacks" used in the
former, and narrows the limits of exemption from toll.
[*Blackburn J.* Sect. 3 enacts that "it may be lawful
for any lessee or contractor for tolls whose lease or con-
tract shall not expire until after the said 1st *January*, 1836,
at any time within twenty-one days after the passing of
this Act, to give notice to the clerk or treasurer of such
turnpike road of his or her intention to vacate such lease
or contract on the said 1st *January*, 1836, upon which
day such lease or contract shall expire accordingly." This
shews that the Legislature thought they were cutting
down the tolls instead of narrowing the exemption from
toll.]

Lush, in reply, was stopped by the Court.

CROMPTON J. I am of opinion that the justice was
wrong in this case. He puts the question in two forms,
which come, however, to the same thing. First, Does
stat. 5 & 6 W. 4. c. 18. s. 1. qualify stat. 3 G. 4. c. 126.
s. 28.? And Secondly, Was the toll taken here payable?

The case depends, in the first instance, on the construc-
tion of stat. 3 G. 4. c. 126. s. 28., and, secondly, on

whether that section is repealed by stat. 5 & 6 *W.* 4. c. 18. s. 1. Mr. *Lush* is right on both points.

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On the first, it is straining words to contend that, when the Legislature say that toll shall not be demanded for a vehicle conveying manure on the ground that it carries baskets or empty sacks, those words only refer to baskets or sacks used for loading or unloading the manure. It would be an extraordinary thing to charge a cart with toll simply because it is bringing back an empty basket. Therefore, not only the grammatical construction, but the common sense construction, of this section is that pointed out by Mr. *Lush*. Besides, I cannot see how empty baskets could be used for the purpose of loading or unloading manure.

Then the second Act does not repeal the first. A statute cannot be repealed without express words or necessary implication. Here are no repealing words, and, as my brother *Blackburn* has pointed out, the third section shews that the Legislature considered that the effect of the exemption in the first section would be to put the toll contractors in a worse position than before. Stat. 5 & 6 *W.* 4. c. 18. s. 1. enacts that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, (save and except lime,) and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw, which may have been conveyed." The first part of the addition applies to implements for filling the manure; for the cloth used in covering hay, &c., is not equivalent to the empty baskets and sacks mentioned in the former Act, and in any event could not be an implement for

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loading or unloading. These two sections must, therefore, stand together, although I do not know whether the Legislature meant it.

BLACKBURN J. I also am of opinion that the decision of the justice was wrong. I agree with my brother *Crompton* that the question depends on the construction of sect. 28 of 3 G. 4. c. 126. The Legislature having thought fit in sect. 32, for a reason intelligible enough, namely, the encouragement of agriculture, to exempt manure generally from toll, passed sect. 28, which we must construe with reference to the ordinary course of business.

In practice, when a person sends agricultural produce to a town, that is the most convenient time for bringing back manure. But everybody knows that when a person sends ordinary agricultural produce, such as wheat or potatoes, to a town, he sends it in sacks or baskets, and he has to bring them back empty; and the Legislature seem to have thought that those things should have the privilege of manure in being exempt from toll. The argument of my brother *Hayes* is that this must be restricted to baskets necessary for loading or unloading the manure; and that empty sacks must also mean empty sacks necessary for that purpose. But that would make nonsense of the Act. For how can empty sacks be used for "the loading and unloading of manure"? Taking this to be so, is that enactment repealed? I do not see it. According to its preamble the object of stat. 5 & 6 W. 4. c. 18. was to put an end to disputes relative to exemption from toll,—according to my brother *Hayes* it was to subject carriages carrying manure to toll from which

they were exempt. Then looking at the body of the Act, we shall see that the Legislature thought its object was to exempt from tolls;—it is an affirming, not a repealing enactment. The Legislature, in 5 & 6 *W.* 4. c. 18., were not thinking of 3 *G.* 4. c. 126. s. 18. at all; but if they were, there are no words to shew that the exemption in the former Act was intended to be taken away.

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MELLOR J. I am of the same opinion. I was rather struck at first with the suggestion of my brother *Hayes* arising out of the recital to stat. 5 & 6 *W.* 4. c. 18., and also from the expression in stat. 3 *G.* 4. c. 126. s. 28., that the implements there spoken of must be understood as implements used for loading or unloading manure. But, on looking carefully at that section, I am satisfied that my brothers are right in the construction they have put upon it, and that any other would be a strained one. Then there is no real ground for contending that the second Act by implication repeals the first. When we look at sect. 3 of the latter in connexion with the title of the statute we shall see that it was passed in consequence of disputes having arisen on the meaning of other statutes as well as the 3 *G.* 4. c. 126.; and that the object of the Legislature was to increase the exemptions from toll rather than to narrow them.

Judgment for the appellant.

END OF EASTER TERM.



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Where an action is brought upon a judgment for a sum not exceeding 20*l.* for the purpose of enabling the plaintiff, by adding the costs to the sum recovered by the judgment, to recover a sum exceeding 20*l.*, and so to issue a *capias* and defeat the object of stat. 7 & 8 *Vict. c.* 96. *s.* 57., the discretion of the Court under stat. 43 *G. 3. c.* 46. *s.* 4. as to granting costs to the plaintiff is not taken away by the later statute, but they will be guided in the exercise of that discretion by its provisions. *Dickinson v. Angell*, 840.

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On the trial of an action for libel in the C. B., to which a justification was pleaded, the plaintiff's counsel, after his reply, elected to be nonsuited. The plaintiff then brought an action in this Court for the same libel, and on the 13th *January* delivered a declaration, which was the same as in the first action. On the 14th *January* the defendant's costs in the first action were taxed. On the 21st he obtained time to plead. On the

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22d he took out a summons to stay proceedings in the action until the plaintiff had paid the costs of the first action and given security for the costs of the second. On the 24th the Judge indorsed the summons "No order, without prejudice to any application to the Court." On the 30th a rule in similar terms was obtained and served upon the plaintiff's attorney. In the meantime the defendant had pleaded, his plea being the same justification, and, issue being joined, the plaintiff, on the 28th, gave notice of trial, and delivered briefs to counsel before the service of the rule. When the plaintiff commenced the first action he was bankrupt, and his discharge had been suspended for one year from the 13th May, 1862, with protection for one month. The Court, in the exercise of its discretion, made the rule absolute for staying proceedings; but discharged so much of it as related to security for costs. *Prowse v. Loxdale*, 896.

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I. Where an act of bankruptcy, under 24 & 25 *Vict. c. 134. s. 72.*, takes place after an execution issued against the party and a seizure of his goods, but before a sale takes place under it, the execution is not put an end to by 12 & 13 *Vict. c. 106. s. 133. Edwards and another v. Scarsbrook*, 280.

II. After issue had been joined and notice of trial given in an action on a bill of exchange, the defendant obtained a Judge's order for a commission to examine witnesses abroad, on payment into Court of a portion of the plaintiff's claim. The money was paid in accordingly, but the commission was not acted on. The defendant having subsequently become bankrupt, and his assignees appointed, the plaintiff obtained leave to proceed with the action, which was tried, and, the defendant not appearing, a verdict was given for the plaintiff: held, that the plaintiff was entitled to the

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money which had been paid into Court, and that he was not deprived of this right by The Bankrupt Act, 12 & 13 *Vict. c. 106. s. 184. Murray and another v. Arnold*, 287.

III. *Semble*, that the plaintiff was not in the position of a creditor "having security for his debt" within that section: dubitante *Blackburn J. Id.*

IV. After the passing of the statute 24 & 25 *Vict. c. 134.*, to amend the law of bankruptcy and insolvency, a person resident within the jurisdiction of the B. District Court of Bankruptcy, being in gaol at C. out of that district, petitioned in formâ pauperis under sect. 98 for adjudication of bankruptcy against himself; his debts exceeding 300*l.* The Judge of the County Court at C. (called for distinction the Gaol County Court) adjudicated him bankrupt, and made an order under sect. 94 to transfer the proceedings to the County Court of S., the district in which he had resided for six calendar months before filing his petition (called for distinction the Home County Court.) The Judge of that Court having refused to adjudicate, as the debts of the bankrupt exceeded 300*l.*: held that he was right, as that Court had no jurisdiction. *Ex parte Coombs, a Bankrupt*, 296.

V. *Quere*, whether the petition ought to have been presented to the District Court of Bankruptcy at B.: and, if not, what proceedings ought to have been taken after the adjudication in bankruptcy by the Gaol County Court? *Id.*

VI. The Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c. 106.*, enacts, in its 129th section, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of the filing of such petition:" Held that, in order to bring a case within this enactment, the act of bankruptcy must be one to which the title of the assignees could relate. *Paull and another, Assignees, &c., v. Best*, 537.

VII. On the 27th *March*, 1861, *J. P.* committed an act of bankruptcy under The Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c. 106. s. 67.*, by making a fraudulent conveyance of all his goods and chattels to *A. B.*, his landlord, but no attempt was made by any creditor to obtain an adjudication upon it, nor did it appear that there was any creditor who could have done so. On the 11th *October*, the day from and after which The Bankruptcy Act, 1861, 24 & 25 *Vict. c. 134.*, came into operation, *A. B.* made a distress on the goods of *J. P.* for four years' rent; and, on the 17th *October*, *J. P.*, who was not a trader, was adjudicated bankrupt on his own petition under sects. 86, 87 of the last mentioned Act, and assignees appointed: held, that the title of the assignees could not relate back to the act of bankruptcy in the preceding *March*, and consequently, the 129th section of the first mentioned statute did not apply. *Id.*

BASTARDY ORDER.

I. Stat. 7 & 8 *Vict. c. 101. s. 4.* enacts that, "within twenty-four hours after the adjudication and making of any order" in bastardy, the putative father may give notice of appeal to the Quarter Sessions: Held, that this time must be counted from the oral adjudication of the justices in petty Sessions, and not from the time when the formal order is signed by them; overruling *Reg. v. The Justices of Flintshire*, 15 *L. J. M. C.* 50; 10 *Jur.* 475. *Ex parte Johnson*, 947.

II. *Quære*, whether the formal order must be signed by all the justices at the same time? *Id.*

III. *Quære*, whether a verbal notice of appeal is sufficient under this section? *Id.*

BILL.

Of exchange.

I. In an action by indorsee against indorser, it appeared that the defendant, upon being told that the holders of the bill were about to take proceedings against him on it, said that he would pay the bill if time to pay it were given

BILL.

him: Held evidence from which the jury might infer that he had waived the right to notice of dishonour. *Woods and others v. Dean*, 101.

II. A declaration alleged that *A.*, in parts beyond the seas, made a bill of exchange in four parts, and directed the same to *B.*, in parts beyond the seas, and thereby required him at sixty days sight of that first of exchange, second, third, and fourth of the same tenor and date being unpaid, to pay to *C.* or order 2500 dollars. It then set forth a similar bill of the same date for 2480 dollars, and also a similar one of the same date for 1250 dollars. It then averred that the payees of the bills respectively indorsed them to *D.*, who indorsed them respectively to the defendant, who sold the bills respectively to *E.*, and indorsed to him the firsts of the bills respectively, and *E.* indorsed them respectively to the plaintiff; and the plaintiff, being the holder of those firsts of the bills, transmitted them to be presented to the drawees for sight and acceptance of those firsts, and the same were by accident lost in the course of such transmission, so that they could not be presented for such sight and acceptance, of all which the defendant had notice; and thereupon the plaintiff required the defendant to deliver to him the seconds, thirds, and fourths of the bills: but the defendant would not deliver the same, whereby the plaintiff was prevented from presenting the bills for sight and acceptance within the time during which they could, according to the laws of the country in which they were drawn and made payable, have been presented, and the same thereby became worthless and void, and the plaintiff was deprived of the value and amount thereof. The defendant pleaded that *D.* indorsed to him the firsts of the bills of exchange respectively, and never did indorse to him the seconds, thirds, and fourths of them, and never did deliver to him those seconds, thirds, and fourths; and that *E.* did not, at the time of the sale and indorsement by the defendant to him, or until long after the indorsement by *E.* to the plaintiff, and long after the alleged loss, require the defendant to deliver to him the seconds, thirds, and fourths:

BILL.

avement, that the defendant never, at any time, had in his possession or control the seconds, thirds, and fourths, and that he was wholly unable to obtain possession of them. Held, that the declaration disclosed no cause of action. *Pinard, Director, &c., v. Klockmann and another*, 388.

III. Per *Crompton J.* The plea was bad also. *Id.*

IV. *Semble*, that the defendant was not estopped from setting up the matters alleged in the plea. *Id.*

V. Declaration by the executor of *B.* upon a bill of exchange purporting to be drawn by *A.* and accepted by the defendant, and indorsed by *A.* to *B.* Plea, that *A.* did not indorse the bill. It appeared that *A.*, who was possessed of goods, being the stock in trade upon his premises, died intestate and indebted to the defendant and other persons; and it was arranged between *B.* and the defendant, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and indorsed by *A.* The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and indorsed to the plaintiff by procuration in the name of *A.*, and accepted by the defendant. Held, that the defendant could not be allowed to set up as a defence to the action that the bill was not indorsed by *A.* *Ashpitel, executor of James Peto, v. Bryan*, 474.

Of sale.

By deed made on the 30th January, 1860, in consideration of 410*l.* lent to the plaintiff by the defendant, the plaintiff assigned certain household furniture, farming stock, and goods and chattels and future personal estate and effects to the plaintiff, subject to a proviso for redemption if the plaintiff should pay to the defendant 410*l.* "on the 30th January, 1870, or at such earlier day or time as the defendant, or his attorney or agent, should appoint for payment thereof, by notice in writing, sent by post or delivered to or left at the house or last known place of abode" of the plaintiff;

BIRTH IN WORKHOUSE. 967

with a power of immediate entry and sale on default of payment contrary to the proviso and the true intent and meaning of the deed; and there was a proviso that until default the plaintiff should hold possession and use the goods, chattels and effects, without any hindrance or disturbance by the defendant. The defendant, at noon of the 20th February, 1860, gave the plaintiff notice to pay the money to him at half past twelve of the same day, and at that time, the plaintiff not paying the money, seized the plaintiff's goods, and afterwards sold them: Held, that the notice under the proviso must be reasonable, and that the notice given by the defendant was not given in a reasonable time. *Brighty v. Norton*, 305.

See *Court, Contempt of.*

BIRTH IN WORKHOUSE.

See *Pauper, Removal of, I.*

BONA FIDE.

See *Defamation, Libel, II. Rate, Church.*

BOND, ADMINISTRATION.

See *Probate Act.*

BOROUGH.

See *Rate, County. Municipal Corporations.*

BRICKS, BURNING.

See *Nuisance, II.*

BRIDGE.

See *Metropolis Local Management Act, I.*

CANAL COMPANY.

See *Nuisance, V. Public Health Act, III.*

CAPIAS.

See Action on Judgment.

CASE, TRANSMISSION OF, TO
SUPERIOR COURT.

See Justice of the Peace, III. IV.

CESTUI QUE TRUST.

See Copyhold, II.

CHARTER PARTY.

See Warranty.

CHECQUE.

See Contract, I.

CHILD.

Under sixteen. *See Pauper Lunatic,*
I. II. III.

Employment of. *See Print-Works.*

CHURCH.

Rate. *See Rate, Church.*

Warden. *See Parish.*

CLERK.

Of the peace. *See Justice of the Peace,*
I. II.

To justice of the peace. *See Justice of*
the Peace.

COCKFIGHTING.

See Cruelty to Animals.

COMMISSIONERS OF SEWERS.

See Water.

COMMON LAW PROCEDURE
ACT, 1854.

See Garnishee.

Canal. S
Act, III.

Joint stock

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Mining.

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Railway.

I. By TI

dation Act, 1845, 8 & 9 Vict. c. 20. s. 68., the Company shall make and maintain "for the accommodation of the owners and occupiers of lands adjoining the railway," among other works, "All necessary arches, tunnels, culverts, drains, &c., either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed." By sect. 69, "If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices, &c." The owners of mines extending under a railway, which had been made by a railway Company under the powers of their Act, 3 W. 4. c. xxxiv., which contained similar provisions with the 8 & 9 Vict. c. 20., gave notice to the Company in 1858 of their intention to work the mine under the line of railway, and the Company declined or neglected to purchase. At this point the line of railway was in a deep cutting, and the Company had made drains upon the line for the purpose of carrying off the water which fell upon the railway, and ran from the sides of the cutting. The working of the mine had caused the land on which the railway was constructed to sink, so that the Company were compelled to fill up such sinkings in order to preserve the level of the railway, and thereby the drains had become in some places choked up, and the water percolated through the broken strata and through the cinders used by the Company for filling up the sinkings, and so passed into the mines. Held, that these drains were not accommodation works within sects. 68 and 69 of 8 & 9 Vict. c. 20. *The Queen v. Fisher and Gough*, 191.

II. A railway Company were authorized by Act of Parliament to construct a branch railway tunnel under land on part of which were erected a manufactory and buildings connected therewith, of which K. was owner in fee. In 1848, K.

made a claim against the Company for compensation under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The claim was referred to arbitration; and on the 6th April, 1848, the arbitrators made an award, by which, after reciting that it had been agreed that the amount to be paid "for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said branch railway or tunnel, and in full compensation for all damage or injury to be sustained by reason of the construction" thereof, should be left to arbitration, they awarded that the Company should pay unto K. the sum of 126*l.* "as compensation for the right to construct and for ever maintain the said branch railway or tunnel underneath the said hereditaments and premises, and for the purchase of the site of the said tunnel, and in full for compensation for all damage and injury sustained by him by the construction thereof." By deed of grant, dated November 7th, 1848, reciting, among other things, the passing of the special Acts of Parliament relating to the railway, and the agreement to refer, and the award, K., in consideration of the sum therein mentioned, which he acknowledged to be "in full for the purchase of the site of, and the right to construct, maintain, and use the said tunnel underneath the pieces or parcels of land and hereditaments," granted to the Company "the site of, and full and free liberty, power and authority . . . to bore, dig out, excavate, make, and construct the said branch railway or tunnel" underneath the said pieces or parcels of land, "together with the full, free, exclusive and uninterrupted right and liberty, at all times for ever hereafter, to use, enjoy, uphold, maintain and repair the tunnel and branch railway, and the site thereof," to hold the said liberty and all other the premises "for the purposes of the several Acts of Parliament relating to the said railway, freed and discharged from all claims and demands whatsoever of or by" K. his heirs, &c. Subsequently the branch railway or tunnel was opened for traffic in 1849, and serious injuries were from time to time sustained by the buildings

and the manufactory caused by the subsidence of the surface consequent upon the construction of the tunnel in such a soil (the stratum through which it passed at this point of its course, and upon which the premises stood, consisting of clay and loose earth), and by the vibration resulting from the passing of heavily laden and other trains along the tunnel, "or by one of such causes." Held:

1. That *K.* could maintain no action against the Company.

2. That *K.* was not entitled to compensation under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 68. *Croft v. The London and North Western Railway Company*, 436.

See also *Rate, Poor, II.*, and *Public Health Act, III.*

COMPENSATION.

See *Water. Company, Railway.*

COMPOSITION, EXPLOSIVE.

See *Gunpowder.*

CONDITION.

See *Contract, I. VIII.*, *Warranty, I. IV.*

CONFUSION OF GOODS.

See *Conversion.*

CONSENT OF JUDGE.

See *Vexatious Indictments, I.*

CONSIDERATION, FAILURE OF.

See *Contract, II.*

CONSTRUCTION OF CONTRACT.

See *Contract, VII. IX. Judge and Jury.*

CONTEMPT OF COURT.

See *Court, Contempt of.*

CONTRACT.

CONTRACT.

I. Where a party, by means of a false pretence or a promise or condition which he does not fulfil, procures another party to give him a note or cheque or acceptance in favour of a third, to whom he pays it, and who receives it *bonâ fide* for value, the giver remains liable on the note, &c.; because his acceptance imports value and liability *primâ facie*, and he can only relieve himself from his promise to pay the holder by shewing that he is not holder for value, or that he received the instrument with notice or not *bonâ fide*. *Watson v. Russell*, 34.

II. The defendant chartered a ship to *K.* at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, *K.* received from the plaintiff, through whom he had sub-chartered the ship to *B.*, a cheque for half the amount due, payable to the order of the defendant, upon the terms that *K.* should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. *K.* paid the cheque to the defendant; but omitted to inform him of the terms on which it had been given, and he had no notice of them; and, the remainder of the money being unpaid, the defendant, who had obtained cash for the cheque, stopped the ship: Held,

Per *Crompton, Blackburn and Mellor JJ.*, that an action for money had and received to recover the amount of the cheque was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by *K.*

Per *Cockburn C. J.*, that the plaintiff was entitled to recover back so much of the amount of the cheque as no consideration had been given for, in consequence of the defendant having stopped the ship. *Id.*

III. The defendants had become responsible, as *del credere* agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50s. per quarter free on

board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50s. per quarter, 4626l., less freight, at 10s. 9d. per quarter, 1001l. 10s.; and a policy of insurance effected on the cargo valued at 3600l. On behalf of the plaintiffs evidence was given, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not paying or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender nor did they tender, "the usual shipping documents" according to the contract: Held, that whether the plaintiffs had so tendered was a question for the jury. *Tamvaco and others v. Lucas and others*, 89.

IV. Declaration for work done. Plea, that the work was done under a contract by which the plaintiff agreed to execute the work to the satisfaction of the defendants or their agent, with a proviso that if the works should not proceed as rapidly and satisfactorily as required by the defendants or their agent, they should have full power to enter upon and take possession of the works, and pay whatever number of men might be left unpaid by the plaintiff, and might set to work whatever number of men they might consider necessary, and that the amount so paid, and the costs of the men so set to work, should be deducted from any moneys that might be due to the plaintiff; and that the defendants, having acted on the proviso, claimed to deduct the costs incurred by them in satisfaction of the plaintiff's demand. Replication, that the works did proceed as rapidly and satisfactorily as the defendants reasonably and properly could require, and that the defendants and their agent unreasonably, improperly, and capriciously required the works to

proceed as in the plea alleged. Held, on demurrer, that the replication, which stopped short of alleging *mala fides* in the defendants, was no answer to the plea. *Stadhard v. Lee and another*, 364.

V. Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. *Taylor and another v. Caldwell and another*, 826.

VI. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied. *Id.*

VII. Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. *Id.*

VIII. *A.* agreed with *B.* to give him the use of a Music Hall on certain specified days, for the purpose of holding concerts, with no express stipulation for the event of the destruction of the Music Hall by fire: held, that both parties were excused from performance of the contract. *Id.*

IX. An instrument is not a demise, although it contains the usual words of demise, if its contents shew that such was not the intention of the parties. *Id.*

CONTRIBUTORY.

See *Company, Joint Stock, and Mining, I.*

CONVERSION.

Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the *Thames*. A fire took place, in consequence of which the tallow melted and flowed down into the main sewers, and thence into the river, from which several portions of it were unwarrantably taken by different persons. *A.*, one of these persons, sold some of it to *B.*, which was taken from him by the police, and he was charged before a police magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under The Act for regulating the Police Courts in the Metropolis, 2 & 3 *Vict. c. 71. s. 29.*, and it was sold by direction of the Commissioner of Police before the twelve months limited by sect. 30 of that Act had expired. *C.* having purchased the tallow from the police: held that *A.* had no property in the tallow entitling him to maintain an action against *C.* for its conversion. *Buckley v. Gross and another*, 566.

CONVEY, POWER TO.

See *Copyhold*.

CONVICTION, SUMMARY.

See *Justice of the Peace, Jurisdiction of. Refreshment House*.

COPY OF DEPOSITIONS.

See *Pauper, Removal of*, II.

COPYHOLD.

I. A testator authorized, empowered and directed his executors to sell, either by public auction or private contract, his messuage, &c., holden of the manor of *H.*, "and to convey and assure such copyhold hereditaments unto the purchaser or purchasers thereof." The executors sold the messuage by auction, and executed a deed of bargain and sale of

it to the purchaser. Held, that the purchaser was entitled to be admitted as tenant without a previous admission by the executors or the heir. *The Queen v. Sir Thomas Maryon Wilson and another*, 201.

II. Where a person entitled to copyhold tenements in fee, who had never been admitted, and never sought admission to them, died, having devised all his property to his eldest son and heir: held,

1. That on the admission of the son the lord was entitled to two fines, one for the tenant's own admission, and the other as if his father had been admitted.

2. That the lord was not estopped from claiming this on the ground that the property was held in trust, and that he had admitted some of the *cestui que trusts* on payment of the accustomed fines. *Lord Londesborough v. Foster*, 805.

CORRUPTION.

See *Judge, Action against*.

COST BOOK SYSTEM.

See *Company, Mining*, I.

COSTS.

See *Action on Judgment. Highway, Non-repair of. Nuisance*, VI. *Rate, Church*.

Security for. See *Action, Second*.

COUNCILLOR OF BOROUGH.

See *Municipal Corporations Act*.

COUNTY.

Court. See *Court, County*.

Rate. See *Rate, County*.

COURT.

Contempt of.

Sheriff's officers went to the house of a party to execute a writ of *fieri facias*, and took possession of his goods. An

auctioneer and others claimed them under a bill of sale, and proceeded to sell them, notwithstanding the resistance of the officers, whom they treated with considerable violence; whereupon the sheriff took out an interpleader summons, and served it. They disregarded this, and completed the sale and removed the goods: held, a contempt of Court, both at common law and under The Interpleader Act, 1 & 2 W. 4. c. 58. *Cooper v. Asprey*, 932.

Interference of, under Vexatious Indictments Act. See *Vexatious Indictments*, II.

Payment of money into. See *Bankruptcy*, II. III. *County Court*, I.

Superior. See *Justice of the Peace*, III. IV., and *Jurisdiction of*, I.

County.

I. Where a plaintiff takes out of Court in satisfaction of his demand a sum of money which has been paid into Court by the defendant, he does not "recover" that sum within the meaning of The County Court Act, 13 & 14 Vict. c. 61. s. 11.; and consequently, if the sum does not exceed 20*l.*, he is deprived of his costs by that enactment. *Boulding v. Tyler*, 472.

II. An unmarried woman having recovered judgment in a County Court against *A.*, obtained a judgment summons against him from the Sheriff's Court, *London*, under stat. 15 & 16 Vict. c. lxxvii. At the hearing, it having been ascertained that the plaintiff had married in the meantime, the Judge amended the title of the cause by inserting the husband's name: Held that he had no power to do so, and, consequently, that an indictment for perjury could not be maintained against the defendant for false evidence given at that hearing. *The Queen v. Pearce*, 531.

For Gaol County Court and Home County Court. See *Bankruptcy*, IV. V.

Stannaries. See *Company, Mining*.

COVENANT RUNNING WITH REVERSION.

A., by indenture, demised to *B.* for a term of years "certain print and bleach works and other premises, with certain articles, matters and things specified in a schedule thereunder written," and it was agreed that it should be lawful for *B.*, his executors, administrators and assigns, during the continuance of the term, to "renew, reinstate, replace and substitute by new or improved articles, matters and things, any of the articles, matters and things mentioned and specified in the schedule which might become worn out, damaged, destroyed, rendered useless or superseded by improved machinery, and for any of the purposes aforesaid to sell and dispose of such articles, matters and things as should so become worn out, damaged, destroyed, &c., and retain the money arising by any such sale or sales to and for his and their own use and benefit; and also to purchase any new or additional articles, matters and things which he or they might require to be used in his or their trade of a calico printer and bleacher, and also to make any improvements in and upon the works and premises, and at the end or other sooner determination of the term of ten years thereby granted thereof, the articles, matters and things mentioned and specified in the schedule, or such of them as should then remain and be in and upon the demised premises, and also all substituted or renewed articles and things, and also all improvements and additional articles and things which might have been purchased by *B.*, his executors, administrators or assigns, and used by him or them in or upon the demised premises in his or their trade or business of a calico printer and bleacher, or any other trade, should be valued and appraised." *A.* died during the term, having appointed &c. his executor and devised to him the reversion in the premises, and the articles, matters and things expectant on the determination of the term at the time of his decease: Held, that this covenant did not run with the reversion, and therefore that *B.* having, in an action against the executor of *A.*, recovered

the amount of the appraisement and his costs, judgment de bonis propriis was erroneous, and that it ought to be entered "de bonis testatoris, et si non, as to costs de bonis propriis." *Gorton v. Gregory, executor of Hall*, 90.

CREDITOR.

Assignment to. See *Probate Act*.

Judgment. See *Garnishee*.

CRUELTY TO ANIMALS.

I. Stat. 12 & 13 Vict. c. 92. s. 3. enacts, that every person who shall keep or use any place for the purpose of fighting or baiting any bull, &c., cock, or other kind of animal, whether of domestic or wild nature, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep or use such place; provided that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; "and every person who shall in any manner encourage, aid or assist at the fighting or baiting of any bull, &c., cock, or other animal as aforesaid," shall be liable to a penalty not exceeding 5*l.*: Held, that it is not an offence to assist at the fighting of cocks unless in a place specially kept or used for that purpose. *Morley and others, appellants, Greenhalgh*, respondent, 374.

II. Stat. 12 & 13 Vict. c. 92. s. 2. enacts, that if any person shall "cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused or tortured, any animal," he shall be subject to a penalty; and, by sect. 29, "the word 'animal' shall be taken to mean any horse, &c., dog, cat, or any other domestic animal." Held,

1. That by virtue of sect. 29, a cock was an 'animal' within section 2.

2. That a person who set his cock to fight another after the other had been disabled by its thigh being broken, committed an offence within that section. *Budge*, appellant, *Parsons*, respondent, 382.

CURATE'S SALARY.

CURATE'S SALARY.

See *Rate, Poor*, I.

CUSTOM.

The custom in the trade at *Liverpool* that, in the absence of special stipulation, three months interest or discount is deducted from freights payable under bills of lading, on goods coming from all ports in the United States of *North America*, was applied to ships coming from the ports of *Texas*, when it was admitted into the confederacy of the *United States* in 1846; and on the first shipment from *California* for *Liverpool* after it became one of the *United States* in 1848, the custom was submitted to without dispute. The same custom applies to all ships coming from the port of *British North America* and from *South America*. In the case of vessels arriving from the *East Indies*, *China* and *Australia*, the custom is to allow sixty days discount, and of vessels from the rest of the world not before mentioned to make no allowance. Held that there was evidence from which a jury might infer that the custom as to shipments from the United States of *North America* extended to ports in *California*. *Falkner and others v. Earle and others*, 360.

DAMAGE.

See *Company, Railway*. *Distress*, II.

DEBT, SECURITY FOR.

See *Bankruptcy*, III.

DECLARATION.

Admissibility of, in evidence. See *Patient*.

In life policy. See *Insurance, Life*, II.

DEDUCTION FROM WAGES.

See *Master and Servant*, I.

DEFAMATION.

Of articles.

Semble, that if a person falsely and maliciously disparages an article which another manufactures or vends, and special damage results therefrom, an action will lie, although in so doing no imputation was cast on the personal or professional character of the manufacturer or vendor. *Young and others v. Macrae*, 264.

Libel.

I. A declaration for libel alleged that the plaintiff was patentee of an invention for obtaining Paraffine oil, and that the defendant falsely and maliciously composed and published a libel of him in the way of his trade, in the shape of a circular and report as follows: *Liverpool*, 30th December, 1861 [M]. 500 casks *American* refined Petroleum Kerosine or Paraffine Oil, manufactured by *The Portland Kerosine Company, Portland, United States*, and imported by Messrs. *Maclean, Maris & Co.*, merchants, sold by *Alex. S. Macrae*, broker, *Liverpool*. And such report being in these words. Professor *Muspratt's* Report. I certify that I have carefully tested the above oil, meaning the said oil in the said libel mentioned, and meaning an oil other than and different from the oil so manufactured, sold and traded in by the plaintiffs as aforesaid, and that I find it a colourless and somewhat aromatic liquid, while *Young's Scotch*, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate as aforesaid, has a reddish brown tinge, is much thicker, and has a more disagreeable odour than it, meaning the said oil in the said libel mentioned. I further certify that in burning the two oils comparatively in the ordinary one shilling lamp, I found the power of the light produced by the *American*, meaning the said oil in the said libel mentioned, equals four and a quarter wax candles. The sample of *Young's*, meaning the said Paraffine oil so manufactured, sold and traded in by the plaintiffs, and to which the said privileges relate,

burned under the same conditions in the same lamp, yields, while the lamp remains well filled, a light of nearly the same power as the *American*, but a feebler one after the oil has burned down to one half. The difference at this stage I find to amount to nearly the light of one such candle, or say twenty-five per cent., in favour of *The Portland Kerosine Company's* oil, meaning the said oil in the said libel mentioned. (Signed) *Sheridan Muspratt*, M.D., F.R.S., Fd., M.R.I.A., &c. &c., Professor of Chemistry: and divers of such libels, being composed only of the said report: whereby the plaintiff was injured in his trade, and the reputation of his oil injured, and the sale diminished; with allegations of special damage: Held, that the declaration disclosed no ground of action: dubitante *Wightman J.* *Young and others v. Macrae*, 264.

II. When a writer in a newspaper or elsewhere, in commenting on public matters, makes imputations on the character of the individuals concerned in them, which are false and libellous, as being beyond the limits of fair comment, it is no defence that he bona fide believed in the truth of these imputations. *Campbell v. Spottiswoode*, 769.

III. The plaintiff published in a newspaper, of which he was the editor and part proprietor, a proposal for inserting in it a series of letters on the duty of evangelizing the *Chinese*, and for promoting the circulation of the numbers of the paper in which those letters should appear in order to call attention to the importance of this work of evangelization. A series of letters accordingly appeared in the newspaper, and in the same numbers lists of subscribers for copies of the paper for distribution. In an action of libel against the defendant, the publisher of another newspaper, for an article commenting on the plaintiff's scheme, imputing that his real object was to promote the sale of his paper, and suggesting that the names of some of the subscribers in the lists were fictitious, the jury found for the plaintiff, with the addition that the writer of the article believed the imputations in it to be well founded: Held, that this belief

DEMISE.

of the defendant was no answer to the action. *Id.*

DEMISE.

See *Contract*, IX.

DEPOSITIONS, COPY OF.

See *Pauper, Removal of*, II.

DEPOSITARY OF POLICY.

See *Insurance, Marine*, V. VI.

DERIVATIVE SETTLEMENT.

See *Evidence, Secondary*, II.

DESCRIPTIVE STATEMENT.

See *Warranty*, IV. V.

DEVISE.

See *Copyhold*, II. *Income Tax*.

Implied grant by.

There is a class of implied grants by devise where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. *Pearson v. Spencer*, 761.

See *Way of Necessity*.

DISTRESS.

A declaration alleged that the defendant broke and entered a dwelling house of the plaintiff, seized divers goods and chattels, carried them away, and converted them to his own use. Plea, not guilty by stat. 11 G. 2. c. 19. s. 21. The defendant, who was landlord to the plaintiff, from whom rent was due to him, had, in order to make a distress, entered on the plaintiff's premises by forcibly breaking in a window, and seized and sold his goods; Held,

DISTRICT.

1. That this mode of entry on the premises being unlawful in itself rendered the defendant a trespasser *ab initio*.

2. That the plaintiff was entitled to recover the full value of the goods, and not that value minus the sum due for rent. *Attack v. Brumwell*, 520.

See *Bankruptcy*, VI.

DISTRICT.

Parish. See *Parish*.

Surveyor of highway. See *Highway*, II.

DOCUMENT.

Search for. See *Evidence, Secondary*.

Shipping. See *Contract*, III.

DRAMATIC LITERARY PROPERTY.

See *Partnership*, I.

EASEMENT.

See *Way*.

ELECTION OF CHURCHWARDEN.

See *Parish*.

EMPLOYMENT OF CHILD.

See *Print Works*.

ENTRY OF JUDGMENT.

See *Covenant running with Reversion*.

ESTATE, SETTLEMENT BY.

See *Pauper, Settlement of, by Estate*.

ESTOPPEL.

See *Bill of Exchange*, I. III. *Copyhold*, II.

EVIDENCE.

EVIDENCE.

Circumstantial.

A person may be convicted under stat. 25 & 26 *Vict. c. 114. s. 2.*, of having obtained game by unlawfully going on land in search or pursuit of game, or of having used any net, &c., for unlawfully killing or taking game, upon circumstantial evidence. *Evans*, appellant, *Botterill and others*, respondents, 787.

Of custom. See *Custom*.

Declaration against interest. See *Patent*.

Depositions, copy of. See *Pauper, Removal of*, II.

Examined copy of judgment. See *Rate, Church*.

Extrinsic. See *Insurance, Marine*, IV.

Of felony. See *Justice of the Peace*.

Of partnership. See *Partnership*.

In reply. See *Patent*.

Of wife against husband. See *Vagrant*, II.

Secondary.

I. The Court of Queen's Bench has jurisdiction to review the decision of a Court of Quarter Sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable. *The Queen v. The Overseers of Hinchley*, 885.

II. On a question of derivative settlement, it was alleged that the grandfather of the pauper had been bound as parish apprentice sixty-nine years before. In order to prove the indenture of apprenticeship executed by the parish officers, it was shewn that ineffectual search for it had been made among the papers of the pauper. Held sufficient to render secondary evidence receivable, although no search had been made among the papers of the master: per *Blackburn and Mellor JJ.*; dubitante *Crompton J.* *Id.*

See also *Game. Vagrant*.

EXAMINED COPY &c. 977

EXAMINED COPY OF JUDGMENT.

See *Rate, Church*.

EXCHANGE, BILL OF.

See *Bill of Exchange*.

EXCUSE FOR NON-PERFORMANCE OF CONTRACT.

See *Contract*, I. III. V. VI. VII. VIII.

EXECUTION.

See *Bankruptcy*, I.

EXECUTOR.

See *Covenant running with Reversion*.

EXPENSE OF MAINTENANCE.

See *Pauper Lunatic, and Removal of*, I. III. IV.

EXPLOSIVE PREPARATION OR COMPOSITION.

See *Gunpowder*.

EXPRESS WARRANTY.

See *Warranty*.

EXTRINSIC EVIDENCE.

See *Insurance, Marine*, IV.

FAILURE OF CONSIDERATION.

See *Contract*, II.

FELONY, EVIDENCE OF.

See *Justice of the Peace, Jurisdiction of*, II.

FICTION.

See *Bankruptcy*, VI. VII.

FINE.

See *Copyhold*, II.

FINISHING.

See *Print Works*.

FIRE.

FIRE.

See *Contract*, VIII.

FIREWORKS.

See *Gunpowder*.

FISHERY.

See *Several Fishery*.

FOG SIGNALS.

See *Gunpowder*.

FOOTWAY.

See *Nuisance*, V.

FOREIGN BILL.

See *Bill of Exchange*, II.

GAME.

Under stat. 25 & 26 *Vict. c. 114. s. 2.*, a person may be convicted of having obtained game by unlawfully going on land in search or pursuit of game, without evidence of his having been on any particular land. *Evans*, appellant, *Bolterill and others*, respondents, 787.

See *Justice of the Peace, Jurisdiction of*, I.

GAOL COUNTY COURT.

See *Bankruptcy*, IV. V.

GARNISHEE.

A garnishee, against whom a judgment creditor has obtained leave to proceed by writ, calling upon him to shew cause why there should not be execution against him under The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125. s. 64.*, cannot be held to bail or arrested under stat. 1 & 2 *Vict. c. 110. s. 2. Horner*, executrix, v. *Luff and others*, 818.

GAS COMPANY.

See *Metropolis Local Management Act*.

GENERAL AVERAGE.

See *Insurance, Marine*, VIII.

GOODS, CONFUSION OF.

GOODS, CONFUSION OF.

See *Conversion*.

GRANT, IMPLIED.

See *Devise. Way of Necessity*.

GUNPOWDER.

By stat. 23 & 24 *Vict. c. 139. s. 6.*, "The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature; (that is to say),—no such manufacture shall be carried on without such licence for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles; (that is to say), percussion caps 50 yards, ammunition 100 yards, fireworks 50 yards, fulminating mercury or other preparation or composition of equally explosive power 100 yards, from any dwelling house or any building in which persons not connected with the same manufacture are employed." Sect. 7 imposes a penalty for making percussion caps, or making or keeping ammunition, fireworks, fulminating mercury or other explosive preparation or composition, contrary to the Act. Sect. 9 imposes a penalty for throwing, casting, or firing any squib, serpent, rocket, or other firework in or into any thoroughfare or public place. By sect. 11 the county justices in Quarter Sessions, and the councils of boroughs, may license places for the making of loaded percussion caps, and for the making and keeping respectively of ammunition, fireworks, fulminating mercury, or other explosive preparations or compositions; and by sect. 13, such licenses may be granted conditionally upon precautionary measures being taken and maintained. Upon an information which charged *L.* with making and keeping fireworks, explosive preparations and compositions in a building wherein by the Act it was not lawful to make and keep them, it appeared that fog signals were manufactured and kept

upon his premises, that he had not obtained a license for their manufacture, and that his premises were within the specified distance from other buildings. Fog signals are concave pieces of tin filled with gunpowder, and fitted with nipples and percussion caps, and then firmly attached to each other, in order to secure the greatest amount of explosive power. The only process carried on in *L.*'s premises was mechanical. Fog signals were made for and used by railway Companies. When the fog is so thick that the ordinary signals cannot easily be seen, one of them is placed on the rails, and is exploded by the pressure upon the copper caps of the wheels of an engine passing over it, making a report, which is heard at a considerable distance. The construction of them is attended with some degree of danger to the persons employed in the manufacture. Held, by *Wightman, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that *L.* was liable to a penalty. *Semble*, per *Wightman J.*, that fog signals are fireworks, and therefore *L.* was liable for making and keeping them contrary to sect. 7; and per *Blackburn and Mellor JJ.*, *L.* was liable for making them in a place not licensed, contrary to sect. 6. *Bliss*, appellant, *Lilley*, respondent, 128.

HIGHWAY.

I. The owner of land on both sides of a highway, who claimed the grass and herbage growing on such parts of it as were not gravelled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it: Held, that they were not turned loose within the meaning of The Metropolitan Police Act, 2 & 3 Vict. c. 47. s. 54, clause 2. *Sherborn the younger*, appellant, *Wells*, respondent, 784.

II. Under stat. 14 & 15 Vict. c. 16., districts were formed and highway boards constituted for the management of highways in *South Wales*, and district surveyors were appointed. By stat. 23 & 24 Vict. c. 68. s. 6., the district surveyor is to have "all duties, powers, and responsibilities as regards the parishes in such district, of a surveyor elected under" stat. 4 & 5 W. 4. c. 50.; "and all acts and provisions not hereby re-

pealed, applicable to such last mentioned surveyor, shall, save as herein otherwise provided, apply in like manner to a surveyor of highways of a district appointed under this Act:" and by sect. 43, except as otherwise provided, all the provisions of stat. 5 & 6 W. 4. c. 50. were to remain in force and be applicable to the highways to be managed under the later Act, and the two Acts were to be construed together as one Act. Sect. 40 re-enacted sect. 90 of stat. 5 & 6 W. 4. c. 50., substituting a summons on the district surveyor for a summons on the parish surveyor; but sect. 95 of the earlier Act was not expressly re-enacted. Held, that that section remained in force; and therefore where, on the hearing of a summons against the district surveyor for the non-repair of a highway in *South Wales*, he denies, on behalf of the inhabitants of the parish, the obligation to repair, the justices may direct an indictment to be preferred against the parish. *The Queen v. James and another*, 901.

Non-repair of.

By stat. 5 & 6 W. 4. c. 50. s. 95., if on the hearing of a summons respecting the repair of a highway the inhabitants of a parish, or other party charged therewith, deny their liability to repair, the justices shall direct a bill of indictment to be preferred at the next Assizes or Quarter Sessions; "and the costs of such prosecution shall be directed by the Judge of Assize before whom the said indictment is tried, or by the justices at such Quarter Sessions," to be paid out of the highway rate. Under this section, an indictment having been directed by justices to be preferred, a bill was found at the Spring Assizes, and at the following Summer Assizes the defendants pleaded guilty, having some days before given notice to the prosecutor of their intention to do so: Held, that the Judge had power to direct the costs of the prosecution to be paid out of the highway rate. *The Queen v. The Inhabitants of Haslemere*, 313.

Rate. See *Rate, Highway*.

HOME COUNTY COURT.

See *Bankruptcy*, IV.

HOSTILITIES.

See *Insurance, Marine*, I. II.

IMPLIED

Condition. See *Contract*, V. VI. VII. VIII.

Grant. See *Devise. Way of Necessity*.

Warranty. See *Contract*, VII.

INCOME TAX.

The Duke of *S.* devised certain farms and hereditaments to trustees to secure a yearly rent charge to his wife, the Duchess of *S.*, for life, to be paid by two half yearly payments in every year, "without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rent charge, or on the said Duchess or her assigns in respect thereof, by authority of Parliament or otherwise howsoever." Payment of this rent charge was secured by powers of distress and entry reserved to the Duchess, and by a term of years created in the trustees: Held, that the Duchess was entitled to have the rent charge paid to her in full, and free from deduction in respect of income tax imposed under the 5 & 6 *Vict. c. 35.* or subsequent Acts. Per the Exch. Chamber, consisting of *Erle C. J., Pollock C. B., Williams, Willes and Byles JJ.*, and *Martin and Channell BB.*: reversing the decision of the Queen's Bench, consisting of *Wightman and Blackburn JJ.* *Festing v. Taylor and the Dowager Duchess of Somerset*, 217.

INDENTURE OF APPRENTICE-SHIP.

See *Evidence, Secondary*, II.

INDICTMENT.

See *Highway, I., and Non-repair of*.

Vexatious. See *Highway. Vexatious Indictments*.

INDORSEE.

INDORSEE.

See *Bill of Exchange*.

INDORSEMENT.

See *Bill of Exchange*.

INDORSER.

See *Bill of Exchange*.

INFORMATION BEFORE JUSTICE OF THE PEACE.

See *Justice of the Peace*, III. IV., and *Jurisdiction of*, I.

INSURANCE.

Life.

I. In 1855, the plaintiff having been for twenty years clerk in a bank of which *P.* was the managing partner, his salary was increased from 200*l.* to 600*l.* a year, and was to continue at that amount for seven years. Before this the plaintiff had received advances from the bank to the amount of 4700*l.* *P.* had told him that, during his (*Peder's*) life, he should never be called upon for the money; and in 1856, he being desirous to secure himself, in the event of *P.'s* death, with his permission insured his life, with a certain Insurance Company, for 5000*l.*; and in 1857, his debt having increased to 6000*l.*, he, with the consent of *P.*, effected a further policy of insurance for 2500*l.* in another Insurance Company. *P.* died on the 21st March, 1861: the bank stopped payment in the same year, and inspectors were appointed, to whom the plaintiff paid the 5000*l.* which he received on the first policy. In an action on the second policy, held,

1. That the plaintiff had not an insurable interest in the life of *P.*, within stat. 14 *G. 3. c. 48. s. 1.*, by reason of the bare promise of *P.* that he would not, during his life, enforce payment of the debt due to the bank from the plaintiff.

2. That the plaintiff had an insurable interest in the life of *P.*, within that statute, arising from the engagement by *P.* to employ him for seven years at a salary of 600*l.* a year, to the extent of as much of the period of seven years as remained at the time the policy was effected.

3. That the payment of 5000*l.* on the first policy was a bar to the plaintiff's claim by virtue of stat. 14 *G. 3. c. 48. s. 3. Hebden v. West*, 579.

II. A life policy of insurance was entered into with a Company on the life of *H. F.*, which was founded on a written declaration of the assured agreed to be the basis of the contract between the parties, and contained a proviso that "if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever, or if the said *H. F.* should go to any place beyond the limits of *Europe*, &c., the policy should be void, and all monies paid in respect thereof should be forfeited to the said Association." The proposal and declaration contained the usual particulars, and proceeded as follows: "I do hereby declare that the above written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and *The Manchester and London Life Assurance Association*, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void." Held, that the policy and declaration must be read together, and so reading them the policy was not avoided by an untrue statement in the declaration, unless designedly untrue. *Fowkes and another v. The Manchester and London Life Assurance and Loan Association*, 917.

Marine.

I. The clause in an ordinary policy of marine insurance on a ship and goods which insures against losses occasioned by "arrests, restraints, and detainerments of all kings, princes, and people, of what nation, condition or quality soever," applies to a seizure of the ship in con-

sequence of an embargo laid on her by the Sovereign of the country of the assured, for the purpose of carrying on a war with another power; per *Crompton and Blackburn JJ.* in this Court: and affirmed in the Exchequer Chamber, per *Erle C. J. Williams* and *Keating JJ.*, and *Bramwell B.*; dubitante *Pollock C. B. Aubert and another v. Gray*, 163.

II. There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, and an embargo connected with such hostility: per the same Judges in the Exchequer Chamber. *Id.*

III. *Quere*, if the act of seizure was a lawful act under the municipal law of the country of the assured? per the same Judges in the Exchequer Chamber. *Id.*

IV. Declaration on a policy by which the plaintiffs were assured "at and from all or any ports and places in the *Clyde*, or from *Liverpool*, to *Kurrachee* or *Calcutta*, and for the space of thirty days after her arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called *The Ganges*, a steamer." There were pleas of unseaworthiness and of undue concealment, on which issues were joined. *The Ganges* was built for navigating the *Indus*, and was on this account of such a construction as to be unfit generally for ocean navigation. Every thing however was done that possibly could be done by temporary appliances to render a vessel of her construction as strong as she could be made to encounter the perils of the voyage insured. The assured had, before the policy was entered into, informed the defendants of the original construction and character of the *The Ganges*, telling them at the same time that the additional strengthening contemplated was then in progress, and that every thing possible would be done to strengthen and fit her for the voyage. An additional premium was paid commensurate to the increased risk arising from the character of the vessel.

1. Held, that the warranty of sea-

worthiness must be taken to be limited to the capacity of the vessel, and therefore was satisfied if, at the commencement of the risk, the vessel was made as seaworthy as she was capable of being made: though it might not make her as fit for the voyage as would have been usual and proper if the adventure had been that of sending out an ordinary sea-going vessel.

2. That extrinsic evidence as to the character of the vessel was admissible. *Burges and another v. Wickham and another*, 669.

V. The deposit of a policy of insurance on a ship at sea, which is afterwards injured by perils insured against and condemned, does not invest the depositary with implied authority to give notice to the underwriter of abandonment as for a total loss. *Jardine and others v. Leathley*, 700.

VI. *Quere*, if there were a mortgage of the ship? *Id.*

VII. By memorandum of charter-party, dated *London*, it was agreed between *A. B.*, therein described as "owner of the good ship or vessel called *The M.*, of 420 tons or thereabouts, now in the port of *Amsterdam*," and *C. D.*, that the said ship, being tight staunch, strong, and every way fitted and ready for the voyage, should, with all possible despatch, proceed direct to *N. &c.*" In an action by the shipowner against the charterer for not loading the agreed cargo: held, by *Erle C. J.*, *Pollock C. B.*, *Williams and Keating JJ.*, and *Channell B.*, reversing the judgment of the Court of Queen's Bench,

i. That the words "now in the port of *Amsterdam*" amounted to a warranty or condition precedent to the contract that the ship was there at the time of making the memorandum of charter-party.

ii. That the question was properly raised by a plea that at the time of making the charter-party, time and the then situation of the ship were material and essential parts of the contract: although it should seem the question might also be raised by pleading the material circumstances on which the defendant

relied as leading to the construction which the plea sought to put on the instrument. *Behn v. Burness*, 751.

VIII. In a policy of insurance upon a steamer, in the ordinary form, the hull and the machinery were separately valued, with a clause, "average payable on the whole or on each as if separately insured." The steamer had discharged her cargo at *C.*, and while she lay there without any cargo on board her hull was damaged by fire. The cost of repairs to the hull amounted, after a deduction of the usual one-third, to 386*l.* 12*s.* 6*d.*, including the sum of 9*l.* 0*s.* 1*d.* for *Lloyd's* surveyor's fees. An additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common 3 per cent. memorandum. Held, in an action for particular average on the hull; per *Cockburn C. J.* and *Crompton J.*; that assuming these expenses to be particular and not general average, they must be apportioned to the hull and machinery according to their respective values, and that only the sum due for the hull could be added to the direct loss on the hull. *Oppenheim and others v. Fry*, 873.

IX. Per *Blackburn J.* The parties in the preceding case must be understood to have agreed that any expenditure incurred entirely and exclusively for saving the whole subject of insurance, should, for the purpose of adjusting the loss on the policy, be treated as general average. *Id.*

X. *Semble*, per *Blackburn J.*, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested. *Id.*

See *Warranty*.

INSURABLE INTEREST.

See *Insurance, Life, I.*

INTERFERENCE OF COURT.

See *Vexatious Indictments, II.*

INTERPLEADER.

INTERPLEADER.

See *Court, Contempt of*.

IRISH PAUPER.

See *Pauper Lunatic*, III.

IRREMOVABILITY.

See *Pauper Lunatic*, I. III. IV., and
Removal of, IV. V.

JOINT STOCK COMPANY.

See *Company, Joint Stock*.

JUDGE.

Action against.

An action does not lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. *Rossanna Dupin Fray v. Sir Colin Blackburn, Knight*, 576.

Consent of. See *Vexatious Indictments*.

Misdirection by. See *Rate, Church*.

And jury, functions of.

I. Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the Court, and not the jury, must determine. *Behn v. Burness*, 751.

II. When that question is raised by pleading, the Court may, in aid of the construction, take into consideration the surrounding circumstances; such as the circumstances under which, and the purposes for which, the charter party was entered into: aliter if the question is raised by demurrer or on an application for judgment non obstante veredicto. *Id.*

III. If the former, the question arises whether that part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. *Id.*

See *Contract*, III.

JUDGMENT.

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JUDGMENT.

Action on. See *Action on Judgment*.

Creditor. See *Garnishee*.

Entry of. See *Covenant running with Reversion*.

In replevin. See *Rate, Church*.

Summons. See *Court, County*, II.

JURISDICTION.

See *Evidence, Secondary*, I. *Justice of the Peace, Jurisdiction of*, I.

JURY.

See *Judge*.

JUSTICE OF THE PEACE.

I. Justices of the peace are bound by stat. 11 & 12 Vict. c. 43. s. 14. to lodge with the clerk of the peace all summary convictions which take place before them, in order that the same may be filed among the records of the Quarter Sessions. *Ex parte Hayward*, 546.

II. A mandamus does not lie to their clerk for this purpose, even though he may have received the fees for drawing up such convictions allowed under sect. 30 of that Act. *Id.*

III. A party convicted by justices on an information applied to them for a case for a superior Court, under stat. 20 & 21 Vict. c. 43. s. 2. The case was delivered by the justices' clerk to the appellant's attorney on the 31st December, 1862, who gave notice of appeal and a copy to the opposite attorney; and on the 1st January, 1863, sent by post the original to his London agent to be lodged in Court. The London agent received the case the next day, but did not lodge it until the 10th: held that the case had not been duly transmitted to the Court according to the statute. *In re Banks*, appellant, *Goodwin*, respondent, 548.

IV. *Quære* whether, if such a case is duly put into a regular course of transmission to the Court, e. g. by post, and does not reach it within time in conse-

quence of something over which the sender has no control, this is a compliance with the statute. *Id.*

Action against. See *Rate, Church*.

Jurisdiction of.

I. Upon an information under stat. 1 & 2 W. 4. c. 32. s. 30. for a trespass in search of game on land in the occupation of the lord of the manor, the defendant asserted that the land was not, as alleged by the informant, common or waste land within the manor, but was land vested in the inhabitant householders of certain parishes under an inclosure award, and claimed a prescriptive right to kill game on the land, but did not shew that he was an inhabitant householder of either of those parishes. The justices convicted the defendant; and in a case, stated under stat. 20 & 21 Vict. c. 43., set out the evidence upon which they decided that the land was waste or common of the manor, and found that the defendant had no ground for believing that he had the right of shooting over it. By stat. 1 & 2 W. 4. c. 32. s. 30. it is provided, "that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." Held,

1. That the jurisdiction of the justices was not ousted by the claim of a prescriptive right in gross to kill game on the land, there being no colour for such a claim:

2. Nor by the assertion that the land was not in the occupation of the lord of the manor, but was vested in other persons, as the claim of title to oust the jurisdiction of the justices must be a claim of title in the party charged, and not in a third person:

3. Held by *Cockburn C. J.*, *Blackburn* and *Mellor JJ.*, that, there being evidence before the justices of the land being in the occupation of the lord of the manor, this Court ought not to review their decision. But, by *Wightman J.*, that, the evidence being set out, this Court might review their decision and reverse it, if it appeared that they had come to a wrong conclusion. *Cornwell*, appellant, *Sanders*, respondent, 206.

II. Under 24 & 25 Vict. c. 100. s. 42., a female charged a man before justices of the peace with an assault, and on her examination deposed not only that he had assaulted her and hurt her knee, but that he had connexion with her, though she "did not consent, and did what she could to resist him." The other evidence shewed that the part of her statement which related to indecent assault was very improbable, and the justices, disbelieving it, convicted him of an assault: Held that they had jurisdiction to do so, although the evidence, if believed, disclosed a felony. *Wilkinson*, appellant, *Dutton*, respondent, 821.

See *Highway*, II., and *Non-repair of Loan Society. Master and Servant*, I. *Rate, Church. Public Health Act*, IV. V.

KINGSTON UPON HULL IMPROVEMENT ACT.

See *Public Health Act*, I.

LAKES, SOIL OF.

Quare, whether the soil of lakes, like that of fresh water rivers, *prima facie* belongs to the owner of the land or of the manors on either side, *ad medium filum aque*, or whether it belongs to the king in right of his prerogative. *Marshall v. The Ulleswater Steam Navigation Company (Limited)*, 732.

LANDLOCKED PROPERTY.

See *Way of Necessity*.

LANDLORD.

See *Bankruptcy*, VI. VII.

LANDS CLAUSES CONSOLIDATION ACT.

See *Company, Railway*, II.

LIBEL.

See *Defamation, Libel*, V.

LIEN.

LIEN.

See *Bankruptcy*, I.

LIFE INSURANCE.

See *Insurance, Life*.

LIGHTING.

See *Metropolis Local Management Act*, I.

LIMITATION OF TIME.

See *Public Health Act*, I. IV.

LIQUIDATORS.

See *Company, Joint Stock*, I.

LITERARY PROPERTY,
DRAMATIC.

See *Partnership*, I.

LOAN SOCIETY.

An order for payment made by a justice of the peace, under The Loan Society Act, 3 & 4 Vict. c. 110., must be for *immediate* payment: he has no jurisdiction to order payment in a certain time from making the order. *Parker*, appellant, *Boughey*, respondent, 43.

LOCAL GOVERNMENT ACT.

See *Public Health Act*, IV.

LOCALITY.

See *Nuisance*, I. II.

LONDON CITY SMALL DEBTS
ACT.

See *Court, County*, II.

LUNATIC.

See *Pauper Lunatic*.

MAINTENANCE.

See *Pauper Lunatic, and Removal of*, I.
II. III.

MALA FIDES.

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MALA FIDES.

See *Contract*, IV.

MALICE.

See *Judge, Action against*.

MANDAMUS.

See *Justice of the Peace*, II. *Public Health Act*, I.

MANURE.

See *Turnpike*, II. III.

MARINE INSURANCE.

See *Insurance, Marine*.

MASTER AND SERVANT.

I. Upon a complaint under stat. 20 G. 2. c. 19. s. 1., by an artificer against his master for nonpayment of wages, the justices may make a deduction from the wages on the ground that the work was badly done. *Sharp*, appellant, *Hainsworth*, respondent, 139.

II. If the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of stat. 2 & 3 Vict. c. 47. s. 44., and the servant does so, the master is guilty of an offence within that Act, and the servant is guilty as aiding and abetting him within stat. 11 & 12 Vict. c. 43. s. 5. *Wilson*, appellant, v. *Stewart*, respondent, 913.

MATTER OF CONTRACT
DESTROYED.

See *Contract*, V. VI. VII. VIII.

MEASURE OF DAMAGE.

See *Distress*.

MEMORANDA.

Trinity Vacation, 1862, 100.

Michaelmas Term, 1862, 304.

Michaelmas Vacation, 1862, 328.

Hilary Vacation, 1863, 768.

MEMORANDUM, COMMON.

See *Insurance, Marine*, VIII.

METROPOLIS LOCAL MANAGEMENT ACT.

I. *Vauxhall Bridge* was built by a Company under stat. 49 G. 3. c. cxlii., by which they were empowered to make (amongst others) a road leading from the bridge to the turnpike road in the parish of *Lambeth*, and were required to put up lamp-posts and lamps for lighting the bridge, and upon the sides of it, and also upon the sides of the road, under pain of being indicted; and the tolls were to be applied in lighting the bridge and road. Half the bridge which adjoins the county of *Surrey* was to be deemed in the parish of *Lambeth*, but was not to be deemed a county bridge so as to subject the county or parish to the repairs of the bridge or road. By a lighting and paving Act, 9 & 10 Vict. c. cccl., Commissioners were appointed for putting that Act into execution; by sect. 50 they were authorized and empowered to cause (amongst others) the road to the middle of *Vauxhall Bridge* to be kept properly lighted; and by sect. 54 it was enacted that it should be lawful for them to cause such of the streets as they should think proper to be lighted; and by sect. 62 "the present lamps and lamp-posts in the streets and other places within the district or limits mentioned in the Act, and which shall or may hereafter be erected or fixed by virtue of that Act, shall belong to and be the property of the Commissioners." By The Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 90., all the duties, powers and authorities for and in relation to the lighting any parish mentioned in the Schedule (A.) (*Lambeth* being one), or any part of such parish, which at the passing of the Act were vested in any Commissioners or in any other body than the vestry of such parish, are to be vested in and performed by the vestry; and by sect. 93 all property, matters and things vested in such Commissioners or other body, in connection with any such duties or

powers, [are vested] in the vestry of the parish. By sect. 130 the vestry shall cause the several streets within their parish to be well and sufficiently lighted; and by sect. 250 the word "street" applies to and includes any bridge not being a county bridge. Held that, by stat. 9 & 10 Vict. c. cccl., the property in the lamps along the road and on half the bridge was vested in the Commissioners; and the obligation to light the road and half the bridge was transferred from the Bridge Company to the Commissioners; and by The Metropolis Local Management Act, 18 & 19 Vict. c. 120. ss. 90. and 93., the property in such lamps and the obligation to light the bridge were transferred from the Commissioners to the vestry of the parish of *Lambeth*.

Semble, if stat. 9 & 10 Vict. c. cccl. had not transferred the obligation and the property from the Bridge Company to the Commissioners, they would be transferred to the vestry from the Bridge Company by sect. 90 of stat. 18 & 19 Vict. c. 120. *The Queen v. The Vestry of Lambeth*, 1.

II. The Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 161., enacts that the sewers rate shall be levied on the persons and in respect of the property rateable to the relief of the poor, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor. Sect. 163 provides that the sewers rate shall, as regards land used as arable, meadow, or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground, be assessed and levied in the proportion of one-fourth part only of the net annual value. And sect. 164 provides "that where any property was at the time of the issuing of the first commission under the said Act of the 11 & 12 Vict. c. 112. (The Metropolitan Commissions of Sewers Act), entitled to exemption from or to any reduction or allowance in respect of the sewers rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewers rate under this Act." On appeal by a gas light and coke Company against

a sewers rate, in which they were assessed in respect of their mains and pipes upon their net annual value ascertained by the poor rate for the time being, the Sessions, being of opinion that the appellants derived only half of the benefit in respect of their mains and pipes as compared with other property in the parish, reduced the rate to one half the amount. Held that, inasmuch as the mains and pipes did not fall within the description of property mentioned in sect. 163, nor within any exemption or reduction mentioned in sect. 164, the appellants were not entitled to any deduction on the ground of the mains and pipes deriving less benefit than other property from the sewers. *The Queen v. Head and The Metropolitan Board of Works*, 419.

METROPOLITAN POLICE ACT.

See *Conversion. Highway*, II.

METROPOLITAN SEWERS ACT.

See *Water*.

MINING COMPANY.

See *Company, Mining*.

MISDIRECTION BY JUDGE.

See *Rate, Church*.

MISREPRESENTATION IN POLICY.

See *Insurance, Life*, II.

MONEY.

Payment of, into Court. See *Bankruptcy*, II. III. *Court, County*, I.

Had and received. See *Contract*, II.

MORTGAGE.

See *Insurance, Marine*, V. VI.

MUNICIPAL CORPORATIONS.

Occupation of an attorney's office entitles a person to be a burgess, and therefore qualified to be elected councillor of a borough within The Municipal Corporations Act, 5 & 6 W. 4. c. 76. s. 9., which requires occupation of a "house, warehouse, counting house, or shop." *Re Creek*, 459.

NECESSARY WORKS.

See *Public Health Act*.

NECESSITY, WAY OF.

See *Way*.

NEWSPAPER.

See *Defamation, Libel*, II. III.

NON-REPAIR OF HIGHWAY.

See *Highway*.

NOTICE.

Of abandonment. See *Insurance, Marine*, V. VI.

Of appeal. See *Bastardy Order*.

Of dishonour. See *Bill of Exchange*, I.

Reasonable. See *Bill of Sale*.

NUISANCE.

I. An action lies for a nuisance to the house or land of a person, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law; and this whatever the locality may be where the act complained of is done; and where, on the trial of such an action, it appears that the act complained of was done on the land of the defendant, the jury cannot properly be asked whether the causing of the nuisance was a reason-

able use by the defendant of his own land: per *Erle C. J., Williams and Keating JJ., Bramwell and Wilde BB.*, reversing the decision of the Queen's Bench; *Pollock C. B.* dissentiente. *Bamford v. Turnley*, 62.

II. In an action for a nuisance arising from the burning of bricks on the defendant's land near to the plaintiff's house, it appeared that the defendant's land and the land upon which the plaintiff's house stood were portions of an estate which had been sold in lots as building land; and in the particulars it was stated that there was abundance of brick earth and gravel, which, with other advantages, presented an advantageous opportunity of carrying out safe and profitable building operations. Bricks had previously been made on the spot where the plaintiff's house stood. The Judge directed the jury, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict: held erroneous: per *Erle C. J., Williams and Keating JJ., Bramwell and Wilde BB.*, reversing the decision of the Queen's Bench; *Pollock C. B.* dissentiente. *Id.*

III. Where a person has been convicted, under sect. 14 of The Nuisances Removal Act for *England*, 1855, 18 & 19 Vict. c. 121., of disobeying an order to abate a nuisance under sect. 13, a warrant to levy the penalty imposed on the conviction cannot be issued without a previous summons under sect. 20. *The Queen v. Jenkins*, 116.

IV. The owner of land adjoining a public road is under no obligation to fence excavations in his land unless they are so near to the road as to be dangerous to persons lawfully using it. *Binks, administrator, v. The South Yorkshire Railway and River Dun Company*, 244.

V. Where a canal Company constructed a canal by the side of an ancient public footway, at a distance of about twenty-four feet from it, with a towing path on the bank of the canal, and an intermediate space between them, and,

in consequence of the acts of person authorized by the Company, the distinction between the footway and the canal had become obliterated; and it appeared that, although the public had no right to pass over the intermediate space between the footway and the canal, they were permitted by the Company to do so without objection: Held, that the Company were under no obligation to fence the canal; and consequently that no action lay against them, under the 9 & 10 Vict. c. 93., by the personal representative of a party who had quitte the footway, and, in consequence of the dangerous state of the canal, fell in and was drowned. *Id.*

VI. On the 26th June, 1861, a order of justices was made under The Nuisances Removal Act for *England* 1855, 18 & 19 Vict. c. 121., on the owner of premises, to abate certain nuisance and was served by being left on the premises. The order not having been obeyed, the local authority, on the 16th July, commenced the necessary work which were finished on the 7th September. The owner was resident in *Australia*, and on the 21st May, 1861, executed a power of attorney to the defendant to receive the rents: the defendant received the power of attorney on the 22nd July, and acted upon it by receiving the rents due at *Michaelmas*. By sect. 2 the word "owner" includes any person receiving the rents as trustee or agent. By sect. 19, the costs and expenses incurred in obtaining an order and in carrying the same into effect shall be deemed to be money paid for the use and at the request of the person on whom the order is made; and in case of nuisances by the act or default of the owner, the premises shall be and continue chargeable; and such costs and expenses may be recovered in any county or superior Court. Held, that the defendant not being "owner" within sect. 2 at the time when the order was made, was not liable to an action for the costs and expenses under sect. 19. *In re The Guardians of the Poor of Blithing Union v. Wharton*, 352.

OFFICE OF ATTORNEY.

OFFICE OF ATTORNEY.

See *Municipal Corporations*.

ORAL ADJUDICATION.

See *Bastardy Order*, I.

ORDER.

See *Church Rate*.

In bastardy. See *Bastardy Order*.

Of justice of the peace. See *Justice of the Peace, Jurisdiction of*.

Of removal. See *Pauper, Removal of*.

PARISH.

See *Pauper, Highway*.

I. A district which, by order in council, under stat. 59 *G. 3. c. 134. s. 16.*, is assigned to a chapel in a parish, becomes a separate parish for all ecclesiastical purposes, but continues a part of the parish for other *parochial* purposes, and therefore the inhabitants of the district are entitled to vote in the election of churchwarden for the parish. *The Queen v. Stevens and Woolcombe*, 333.

II. Stats. 53 *G. 3. c. clxii.* and 3 & 4 *W. 4. c. xxxiii.* contain provisions by which any rate in the parish of *C.*, made by virtue of either of the Acts, may be recovered by summons before two justices of the peace; and an appeal is given to the Quarter Sessions. Separate districts for ecclesiastical purposes were afterwards formed in *C.*, under stat. 19 & 20 *Vict. c. 104.* In 1861 the churchwardens of *C.* gave notice that a vestry of the parish, except those districts, would be held to make a rate for the repair of the parish church; and in the notice it was stated that a show of hands would be taken on each proposition or amendment which might be submitted to the meeting, and if a poll should be demanded, the polling would be taken at an adjourned meeting on all the propositions and amendments made at the original meeting. At the meeting a rate of 2*d.* in the pound was proposed, and an

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amendment was moved "that no rate be granted." The majority were in favour of the amendment. Upon a poll being demanded, the vestry was adjourned for the purpose of taking it. At the poll the voting was "for the motion" and "for the amendment;" and at the close of it the chairman declared the motion to be carried, and no other amendment was allowed to be put: Held,

1. That notwithstanding the creation of the separate districts, the local Acts still applied to church rates for the parish church of *C.*

2. That, the amendment being a direct negative of the original motion, it was not necessary to take the poll on each; and that no amendment could be brought forward after the close of the poll. *The Queen v. Roberts, Stone and May*, 495.

PARTICULAR AVERAGE.

See *Insurance, Marine*, VIII.

PARTNERSHIP.

I. *K.*, the licensed proprietor of a theatre, under stat. 6 & 7 *Vict. c. 68.*, entered into an arrangement with *D.* whereby *D.* had the use of the theatre for dramatic entertainments. *D.* provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. *K.*, on his part, paid for printing and advertising, furnished the lighting, door keepers, scene shifters and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of *K.*, who retained one half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to *D.* Among the pieces represented were two which *L.* had the sole liberty of representing or causing to be represented &c., as assignee of the author, under the Dramatic Literary Property Acts, 3 & 4 *W. 4. c. 15.* and 5 & 6 *Vict. c. 45.* Held,

that no action under those statutes was maintainable by *L.* against *K.*, as the above facts did not shew that those pieces had been represented &c. by him, or that there was a partnership between *D.* and him so as to render him liable for the representation &c. of them by *D.* *Lyon and Wife v. Knowles*, 556.

II. The test whether a person who is not an ostensible partner in a trade, is nevertheless, in contemplation of law, a partner, is,—not whether he is entitled to participate in the profits; although this affords cogent, often conclusive evidence of it—but whether the trade has been carried on by persons acting on his behalf; per *Blackburn and Mellor JJ. Kilshaw v. Jukes and others*, 847.

III. *Qu. per Wightman J.*, of the authority of *Wilson v. Whitehead*, 10 *M. & W.* 503? *Id.*

PATENT.

In an action for the infringement of a patent taken out in 1849, the defendant, in support of a plea that the invention was not new, gave evidence that *O.*, who was dead, had in 1846 used a process identical with that in the patent. On the cross-examination of the witnesses it appeared that, if *O.* used the invention and sold the product before the date of the patent, it was only in very small quantities, and that it was not brought into general use; and one of the witnesses was asked in cross examination whether *O.* had not sold some of the product to *S.*, and said he had. The plaintiff in reply called *S.*, who gave evidence that in 1850 or 1851 *O.* sold him a small quantity of the product, and at the time of the sale said that it was a new article, that he did not wish it to be publicly known, and he would sell him all he could manufacture. Held, that evidence of what *O.* said at the time of that sale was not admissible in reply, as it would not have been admissible in chief on an issue whether *O.*, before 1849, used the invention. *Hyde v. Palmer*, 657.

PAUPER.

PAUPER.

Lunatic.

I. The expense of the maintenance &c. of a pauper lunatic above the age of sixteen in a lunatic asylum, under 16 & 17 *Vict. c. 97.*, is not relief given to the parent, so as to prevent the parent acquiring, under 9 & 10 *Vict. c. 66.*, status of irremovability by residence in a parish during that time. *The Queen v. St. Mary, Islington, Middlesex*, 46.

II. *Quere*, if the child were under the age of sixteen? *Id.*

III. A lunatic pauper born in *England*, whose father, an *Irish* man, has not gained a settlement in *England*, and whose mother was not known to have ever gained a settlement, being above the age of sixteen, but living with his parents, and unemancipated, was removed to a lunatic asylum under stat. 16 & 17 *Vict. c. 97.*; Held, that an order for his maintenance upon the parish at his birth was rightly made under sect. 97. *The Queen v. The Inhabitants of Newchurch*, 107.

IV. A pauper lunatic, living by consent apart and in a different parish from her husband, who was irremovable by virtue of stat. 9 & 10 *Vict. c. 66.*, was sent to a lunatic asylum, and an order for her maintenance was made upon the parish of her husband's settlement, under The Lunatic Asylums Act, 16 & 17 *Vict. c. 97. s. 97.*: Held, that the pauper lunatic was not irremovable by stat. 11 & 12 *Vict. c. 111. s. 1.*, and therefore that the order was rightly made under sect. 97, and not under sect. 102 of stat. 16 & 17 *Vict. c. 97.* *The Guardians of East Retford Union, appellants, The Guardians of the Strand Union, respondents*, 122.

V. A *Scotchman*, who had no settlement in *England*, married an *English* woman. While they resided together in an *English* parish, she was sent as a lunatic pauper to a lunatic asylum by order of a justice of the peace, under stat. 16 & 17 *Vict. c. 97.* Held, that

notwithstanding the provisions of stat. 8 & 9 Vict. c. 117., relative to the removal of Scotch paupers and their families to their own country, the expenses of her removal to the asylum and her maintenance there should be charged to the county, and not to the parish where the husband and wife resided. *The Clerk of the Peace for Somerset*, appellant, *The Overseers of the Poor of Shipham*, respondents, 507.

Removal of.

I. An Irish woman unmarried, and not having any settlement in England, applied to the relieving officer of a union for an order of admission to the workhouse, stating that she was in distress and lived in C., one of the parishes within the union, and expected her confinement that day. He declined to give her an order, but told her when she became bad to go to the workhouse and she would be admitted. In the evening of the same day, finding labour coming on, she went to the workhouse and told the master that she had applied to the relieving officer for an order without success, and that she was living in C.: she was admitted, and delivered of a child two hours after. The master entered the name of the mother in the books as "casual," and charged her and her child to the common fund; and, these entries having been laid before the guardians, the relief of the mother and child was charged to the common fund. After remaining in the workhouse a fortnight, the mother returned with her child to her former residence, and continued there for about twelve months; she then went with her child to G., and after four months was admitted into a reformatory in P. The child was not admissible into it, and, becoming chargeable to G., an order for its removal to C. was made with its mother's assent, notwithstanding stat. 9 & 10 Vict. c. 66. s. 3.: Held,

1. That the child was removable, the mother being unable to afford it nurture, and being already separated from it.
2. That the mother, when admitted into the workhouse, was chargeable to C. within the meaning of stat. 7 & 8 Vict. c. 101. s. 56., and, *semble*, also within the

meaning of stat. 54 G. 3. c. 170. s. 3., and the child was therefore settled in that parish by reason of its birth in the union workhouse. *The Queen v. The Inhabitants of St. Clement Danes*, 143.

II. On the 26th October, an order for the removal of a pauper from A. to C. was served on the overseers of C. On the 6th November a letter was written to the overseers of A. by the assistant overseer of C. applying for a copy of the depositions of the grounds of removal, adding, "as it is intended to appeal against such order of removal." No notice was taken of this letter. On the 11th December a formal notice of appeal was given by the overseers of C. to the overseers of A. On the 20th December application was made by the overseers of C. to the clerk to the justices for a copy of the depositions, which was received on the next day, and notice was given to the overseers of A. that the appeal would be entered and respited at the next Sessions, which was accordingly done. Held, that the Quarter Sessions had no jurisdiction to enter and respite the appeal; inasmuch as,

1. The application for a copy of the depositions being made to the overseers of the removing parish, and not to the clerk to the justices, was not sufficient within stat. 11 & 12 Vict. c. 31. s. 3.
2. The letter of the 6th November was not a notice of appeal. *The Queen v. The Inhabitants of St. Alkmand, Derby*, 347.

III. Where, under the 9 & 10 Vict. c. 66. s. 4., a warrant for the removal of a pauper on account of sickness or accident is granted by justices of the peace, who state therein that they are satisfied that the sickness or accident will produce permanent disability, no appeal lies to the Quarter Sessions against this statement. *The Queen v. The Overseers of the United Parishes of St. Mary and St. Andrew, Whittlesey*, 432.

IV. Stat. 24 & 25 Vict. c. 55., passed on 1st August, 1861, by sect. 1 enacts, "that after the 25th March next the period of three years shall be substituted for that of five years specified in sect. 1 of" stat. 9 & 10 Vict. c. 60., "and the residence of a person in any part of a

union shall have the same effect in reference to the provisions of the said section as a residence in any parish." On the 12th *March*, 1862, a township comprised in a union obtained an order for the removal of a pauper who had resided in the union for three years next before the application for the order: the order was executed, and there was no appeal. Held that, the removal being illegal, the removing township could not recover, under stat. 4 & 5 *W. 4. c. 76. s. 84.*, the expense of maintaining the pauper from the time of sending notice of chargeability to the time of removal. *The Overseers of Salford*, appellants, *The Overseers of Manchester*, respondents, 599.

V. Stat. 24 & 25 Vict. c. 55., passed on 1st *August*, 1861, by sect. 1 enacts, that "after the 25th day of *March* next the period of three years shall be substituted for that of five years specified in the 1st section of" stat. 9 & 10 *Vict. c. 66.*, "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish: Held, that a pauper, who, on the 14th *March*, 1862, when an order of removal was made, had resided three years in a union, of which eighteen months next before the application for the order were in the township of *B.*, and more than three years prior to those eighteen months were in the township of *L.*, could not be removed under it after the Act passed. *The Overseers of Preston*, appellants, *The Overseers of Blackburn*, respondents, 793.

See also *Pauper Lunatic*.

Settlement of, by

— apprenticeship.

By indenture of the 29th *September*, 1845, *K.* was apprenticed to *N.* in the township of *B.* for five years; there were covenants by the master to pay weekly wages, and by the father to provide board and lodging during the apprenticeship. On each *Saturday* during the term *N.*'s works closed at two o'clock in the afternoon: throughout the term the pauper resided and slept every night except *Saturday*, and occasionally *Sunday*, at

lodgings in *B.*; on each *Saturday* after leaving work he went, until shortly after his marriage, to the house of his father, who lived in *M.*: he slept there on *Saturday* night, and occasionally on *Sunday* night, and returned to his work on *Monday* morning. Shortly after his marriage, which took place about a year before the expiration of the term, he slept at his father-in-law's house, which was also in *M.*, on *Saturday* nights, and occasionally on *Sunday* nights. For the last eighteen months or two years of the term he lodged at the house of *C.* in *B.*, except on *Saturday* nights, when *C.* required the room which he occupied for members of her own family who came to see her on that day. He slept at his lodgings on the night of *Friday* the 27th *September*, 1850, and about two in the afternoon of the next day left off work and went to *M.*, and slept there that night and also on the *Sunday* night. On the *Monday* morning he returned to *N.*, and worked one week at the same rate of wages, and then left. Held, that he slept in *M.* as an apprentice on the last night of his apprenticeship, and therefore gained a settlement there. *The Queen v. The Inhabitants of Barton upon Irwell*, 604.

— birth. See *Pauper Lunatic*.

— estate.

A. agreed with *B.* to build a house according to certain specifications on land then belonging to *B.*, in consideration of which undertaking, and of an annual rent charge of 25*s.*, a lease of the land for three lives was to be granted. The house was built by *A.* according to the specifications at the cost of 85*l.*, whereupon the lease was granted; the grant of the rent charge and the erection of the house on the land conveyed being together of the pecuniary value to the grantor at the time of the conveyance of more than 30*l.* Held, that *A.* hereby acquired a settlement under 9 *G. 1. c. 7. s. 5.* *The Queen v. The Overseers of Belford*, 662.

— renting a tenement.

By agreement, dated *December* 2nd, 1859, a cottage was let by *A.* to *B.* for

PAYMENT.

three months from the 25th *December*, 1859, at the yearly rent of 18*l.*, the first monthly payment to be made on the 25th *January*, 1850; three months' notice from either party to the other to be a sufficient notice to quit. *B.* having occupied the cottage for eighteen months under this agreement: Held that he gained a settlement by renting a tenement for one whole year, within stat. 6 *G. 4. c. 57. s. 2. The Overseers of Willesden*, appellants, *The Overseers of Paddington*, respondents, 593.

Derivative. See *Evidence, Secondary*, II.

PAVING.

See *Public Health Act*.

PAYMENT.

Under bill of sale. See *Bill of Sale*.

In exchange for shipping documents. See *Contract*, III.

By Loan Society. See *Loan Society*.

Of money into Court. See *Bankruptcy*, II. III. *Court, County*, I.

Plea of. See *Pleading*.

PERJURY.

See *Court, County*, II.

PETITION IN FORMA PAUPERIS.

See *Bankruptcy*, IV. V.

PLEADING.

I. In an action on common counts the defendant pleaded that, in consideration that the defendant would at once pay to the plaintiff the whole of his claim, except a certain portion claimed by the defendant as a deduction from it, the plaintiff agreed that that sum should be deposited in the hands of a third party, to be held by him in trust for the plaintiff and defendant until the difference between them should be adjusted;

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POACHING.

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alleging performance, and that the difference was still pending: Held good as a special plea of payment. *Page v. Meek*, 259.

II. *Quere*, whether the plea was good as a plea in accord and satisfaction? *Id.*

See *Judge and Jury, Functions of*.

POACHING.

See *Game*.

POLICY.

See *Insurance*.

POLL, MODE OF TAKING.

See *Parish*, II.

POND.

See *Water*.

POOR.

See *Pauper*.

POOR RATE.

See *Rate, Poor*.

POSSESSION.

See *Conversion*.

POST, TRANSMISSION OF CASE BY

See *Justice of the Peace*, III. IV.

POWER TO SELL AND CONVEY.

See *Copyhold*, I.

PREPARATION, EXPLOSIVE.

See *Gunpowder*.

PREROGATIVE.

See *Lakes, Soil of*.

B. & S.

PRESUMPTION.

See *Lakes, Soil of*.

PRINCES, RESTRAINTS OF.

See *Insurance, Marine*, I. II. III.

PRINT-WORKS.

S. B., under thirteen years of age, was employed in "skutching" goods which had been previously printed: she was employed in a room or shed, in which "finishing" alone was carried on, but which had an internal and direct communication with print-works, in which all the processes incident to the chief process of printing were carried on: Held, that *S. B.* was employed in a print-work within the meaning of stat. 8 & 9 Vict. c. 29. s. 2., whether "skutching" was an "incidental printing process" or not; and therefore a surgeon's certificate was required by sect. 20. *Hardcastle*, appellant, *Jones*, respondent, 153.

PRIVILEGE.

See *Defamation, Libel*, II. III.

PRIVITY OF CONTRACT.

See *Contract*, II.

PROBATE ACT.

Declaration by a creditor against the sureties on an administration bond in the form given by the rules of the Probate Court, under stat. 20 & 21 Vict. c. 77. s. 81., and assigned to him in pursuance of sect. 83, alleging that assets came to the hands of the administrator, and that he wasted and appropriated and disposed of the same to his own use, and did not pay the debt of the plaintiff, who was thereby put to damage, and that all things existed and happened necessary to entitle the plaintiff to have the bond assigned to him, and to make the assignment to him valid, and to entitle him to recover on the bond the debt and damages sustained. Plea, that the only

PROCEEDINGS, STAYING.

breach of the condition of the bond was the non-payment of the debt of the plaintiff. Replication, that the administrator wasted and misappropriated and disposed to his own use, personal estate and effects of the deceased sufficient to pay, and wherewith he could and ought to have paid, the debt of the plaintiff: Held, that the defendant was entitled to judgment, as the bond could only be enforced for the benefit of persons interested in the estate of the intestate, and not to recover the debt of the plaintiff, and this even although the plaintiff alleged a devastavit as the reason why the administrator had not paid the debt. *Sandrey v. Michell and another*, 405.

PROCEEDINGS, STAYING.

See *Action, Second. Company, Mining*.

PROPERTY LANDLOCKED.

See *Way*.

PROSTITUTES.

See *Refreshment House*.

PUBLIC HEALTH ACT.

I. The Public Health Act, 1848, 11 & 12 Vict. c. 63., after providing for the constitution of the General Board of Health, sect. 4—7; and of Local Boards of Health, sect. 12—33; and empowering the latter to make special, sect. 86, and general district rates, sect. 87, enacts, by sect. 89. "The Local Board of Health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate &c." The *Kingston-upon-Hull* Improvement Act, 1854, 17 & 18 Vict. c. ci., incorporates, with certain exceptions, the 11 & 12 Vict. c. 63. By sect. 4 it constitutes the council of the borough of *Kingston-upon-Hull* the Local Board of Health for that place; and by sect.

131, "any rate made by the Local Board for any of the purposes of this Act may be made either wholly prospectively, or wholly retrospectively, or partly prospectively and partly retrospectively, and if for defraying liabilities incurred before the passing of this Act, or to be incurred within six months before the making of the rate or both: Provided always, that any rate to be laid for defraying liabilities incurred before the passing of this Act shall be laid within six months after the passing of this Act." The Local Board of Health for *Kingston-upon-Hull*, who, in order to defray the expenses on certain public works and improvements executed by them, had levied a private improvement rate, within the meaning of those Acts, upon certain occupiers, discovered, after the rate was paid, that it had been made and the money paid in error. After the expiration of six months from the time of payment, two of those occupiers sued the Board to recover back their money, and obtained judgment by default; and finding that the Board had not any funds available for the satisfaction of the judgment, claimed a mandamus under The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 68., to compel them to make a rate for the purpose: Held, that as the six months limited by the statutes had expired they were not entitled to it.

Quære, whether, if the six months had not expired, the judgment would have been a charge within those enactments? *Burland and another v. The Local Board of Health of Kingston-upon Hull*, 271.

II. Under The Public Health Act, 1848, 11 & 12 Vict. c. 63. s. 69., which empowers every Local Board of Health to require the owners or occupiers of premises fronting, adjoining, or abutting upon a street (not being a highway), to sewer, level, pave, flag, or channel the same, and in default to execute the works required, and charge the expences on the owners, according to the frontage of their premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), the expence of each owner should be apportioned according to the frontage of the premises,

irrespective of the width of the street. *The Queen v. The Newport Local Board of Health*, 341.

III. Under that enactment a railway and canal Company, whose premises abut on a street, but with a fence between them and the street, is liable to be charged. *Id.*

IV. By The Public Health Act, 1848, 11 & 12 Vict. c. 63. s. 68., the management of all streets being highways, within any district, is vested in the Local Board of Health; and by sect. 69, in case any street, not being a highway, is not sewered &c. to the satisfaction of that Board, it may, by notice in writing, require the owners or occupiers of the premises fronting &c. upon it to sewer &c. the same within a specified time; and if this is not complied with, that Board may execute the works, and the expences shall be paid by the owners in default, and either be recovered in a summary manner, or declared to be private improvement expences. By sect. 129, all damages, costs and expences recoverable under that Act are made recoverable before two justices of the peace. The Local Government Act, 1858, 21 & 22 Vict. c. 98. s. 4., enacts that it shall be construed together with the former Act, and be deemed part of it. Sect. 62 enacts, that where the Local Board has incurred expences for which the owners of premises are made liable, they may be recovered from the owner when the works are completed, and shall be a charge on the premises and bear interest till payment, and in all summary proceedings by a Local Board for the recovery of expences incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. And by sect. 63, the apportionment of expences by the Local Board shall be binding and conclusive on every such owner unless, within three months from the time of notice given of the amount, he shall dispute it by written notice. By 11 & 12 Vict. c. 43. s. 11, it is provided that, in all cases where no time is limited for making complaints or laying informations before justices of the peace,

they shall be made or laid within six calendar months from the time when the matter of such complaint or information arises. A street being out of repair, the Local Board of Health gave notice to the owners of the adjoining houses to repair it; and, on this not being complied with, executed the works, and gave notice of the expences and apportionment to each of the owners. The owners gave no notice of disputing the apportionment, and, at the end of the three months limited by 21 & 22 *Vict. c. 98. s. 63.*, the Board made a demand of the amount. The owners having refused to pay, and the expences not having been declared to be private improvement expences; Held, that the Board had six months from the expiration of the three months during which the apportionment might have been disputed to take proceedings before justices of the peace for the recovery of the amount. *Jacomb, Clerk to the Mold Green Local Board*, appellant, *Dodgson*, respondent, 461.

V. By the Public Health Act, 1848, 11 & 12 *Vict. c. 63. s. 54.*, the surveyor of the Local Board of Health may examine any drain, water-closet, privy, cesspool, or ash pit, and if it is in bad order and condition the Board shall cause notice in writing to be given to the owner or occupier of the premises, requiring him to do the necessary works; and if such notice be not complied with, the party shall be liable to a penalty for every day during which he makes default: Held, that the discretion to determine what works are necessary to be done is vested in the Board, and that, on a proceeding before justices to recover the penalty under sect. 129, they have no jurisdiction to review its determination. *Hargreaves*, appellant, *Taylor*, respondent, 613.

QUARTER SESSIONS.

See *Sessions, Quarter*.

RAILWAY.

Company. See *Company, Railway*.

Rate. See *Rate, Railway*.

RATE.

RATE.

Church.

Declaration against justices of the peace alleged that the plaintiffs were rated to a church rate, the validity of which rate was disputed by them; that they were summoned for nonpayment of the rate; that at the hearing before the defendants, the plaintiffs, in good faith disputing the validity of the rate, gave the defendants notice thereof: yet the defendants, not acting *bonâ fide* in the belief that they were acting in conformity to law, and when they well knew that they had not jurisdiction to proceed, made an order for payment of the rate, which order was afterwards quashed, and issued their warrant of distress, by virtue of which the goods of the plaintiff were distrained. Pleas: 1. Not guilty. 2. As to the distraining of the goods of the plaintiffs, that the warrant was issued on the application of the churchwardens, and executed by their direction, as well as by the command of the defendants, and that the plaintiffs afterwards recovered judgment in replevin in the County Court. On the trial it appeared that the plaintiffs objected before the justices to the validity of the rate; but the defendants overruled the objections, and made the order, and subsequently the distress warrant, to enforce the payment of it. The order was made on the 6th *January*, 1859; the distress warrant was signed by the plaintiffs on the 3rd *February*, and the seizure under it was on the 14th *March*. On the 27th *April* the plaintiffs obtained a rule nisi for a certiorari to quash the order, and on the 11th of *June* the order was quashed. The action was commenced on the 13th of *June*. An examined copy of the judgment in the action of replevin, not under the seal of the County Court, was produced by the registrar of the Court. The Judge directed the jury that, if they believed that the plaintiffs *bonâ fide* intended to dispute, and did dispute, the validity of the rate, and gave notice thereof to the defendants, who notwithstanding determined to proceed, the plaintiffs were entitled to recover; but if they thought that the objections made by the plaintiff

to the validity of the rate were put forward merely as a pretext for the purpose of evading payment thereof, and ousting the jurisdiction of the justices, they should find for the defendants. Held,

1. Per *Wightman* and *Blackburn JJ.*, *Mellor J.* dissentiente, that the justices were not liable unless they acted without reasonable and probable cause in deciding that the rate was not *bonâ fide* disputed; and therefore there was a misdirection in not leaving to the jury the question whether the justices acted without reasonable or probable cause for their decision.

2. Per *Wightman*, *Blackburn* and *Mellor JJ.*, that, as regards the making of the order, the defendants, if they needed protection, were protected by stat. 53 G. 3. c. 127. s. 12., which enacts that an action brought for any thing done in pursuance of the Act shall be commenced within three calendar months next after the fact committed: and

3. That the examined copy of the judgment in the County Court was sufficient proof of the substance of the second plea; and that the judgment in replevin was a bar to the recovery of damages for the seizure: and

4. That the costs of bringing up and quashing the order were no part of the damage arising from the seizure; and *quare*, whether they could have been recovered as special damage if the action, as regards the making of the order, had been brought within the three months limited by stat. 53 G. 3. c. 127. s. 12. *Pease and others v. Chaytor and another*, 620.

See *Parish*, II.

County.

The Mayor and Free Burgesses of the borough of *East Looe*, who were a corporation by prescription, received a charter from Queen *Elizabeth* confirming their ancient rights and privileges, and granting others. A further charter was granted by King *James* the Second, by which certain officers of the borough were to be justices of the peace in the borough, and were empowered to hold sessions of the peace, and to inquire of, hear, and determine whatsoever trespasses, misprisions, and other defects and articles within the borough committed,

which the justices of the peace in any county might hear and determine; so that they did not proceed to the determination of any treason, murder, felony, or any matter touching the loss of life; with a non-intromittant clause to the justices of the county. Sessions had been regularly held by the borough justices; but no persons had been indicted or tried there, the practice being to send all offenders to the county gaol for trial at the assizes or sessions of the county; the only business done at the borough sessions being presentments for nuisances. The cost of maintaining the persons so committed had been sometimes paid out of the borough poor rate. The county justices had never exercised any jurisdiction in the borough, except in the custody and trial of prisoners sent to them by the borough justices; nor had the inhabitants of the borough ever been assessed to the county rate, nor had any rate in the nature of a county rate been levied in the borough. By stat. 15 & 16 Vict. c. 81. s. 51., relating to the assessment of county rates, the word "county" shall, in the construction of that Act, mean and include any liberty, franchise, or other place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county at large in which such liberty, &c., may lie, nor contributing to the county rates for such county. Held, that the borough of *East Looe* was within the definition given in that section, and therefore was not liable to be assessed to the rate for the county at large. *The Mayor &c. of East Looe*, appellants, *The Justices of the Peace for Cornwall*, respondents, 20.

District. See *Public Health Act*.

Highway.

In 1859 an Act was obtained for making a turnpike road from *L.* to *A.*, a distance of about sixteen miles, and empowering the trustees to take tolls on two portions of the road so soon as they were respectively completed and open to the public. In 1861, one of these portions, being a distance of about nine miles, was opened to the public, and tolls were taken on it. The other portion had

not been commenced. Upon an information, under stat. 4 & 5 *Vict. c. 59. s. 1.*, alleging that the funds of the trust were insufficient for the repairs of the turnpike roads comprised therein, and that part of the road so opened was out of repair: Held, that the justices had jurisdiction to order a portion of the highway rate to be applied to the repair of the road. *William Roberts*, appellant, *John Roberts*, respondent, 183.

Poor.

I. The parish of *K.* comprises several townships, of which *S.* is one. The vicarial tithes of *K.* were commuted at 86*l.* 13*s.* 4*d.*, the amount of which apportioned to *S.* was 60*l.* 1*s.* 4*d.* The vicarage was also endowed with glebe in the parish of *K.*, but not in the vicar's pastoral charge, and with the proceeds of the sale of glebe invested in the funds, together amounting to 300*l.*; Held, that in assessing the tithe commutation rent charge in *S.* to the poor rate, under stat. 6 & 7 *W. 4. c. 96.*, the salary of a curate necessarily employed by the vicar of *K.* for the proper discharge of the ecclesiastical duties of the parish should not be deducted from the tithe rent charge alone, but should be charged upon the aggregate of all the annui proventus of the vicarage. *The Overseers of Scriven with Tentergate*, appellants, *Fawcett*, respondent, 797.

II. The appellants' railway, after passing through the respondent among other parishes, joined the *L. and B. Railway*, which formed the only access and outlet of their railway to and from *L.* By deed dated 14th April, 1857, the appellants were to be at liberty to carry their traffic over the *L. and B. Railway* upon the terms of paying to the *L. and B. Company* a certain toll for every passenger. The appellants accordingly conveyed their passengers in trains consisting of their own carriages, along their line and over the *L. and B. line*, charging but one fare for conveying a passenger from any part of their line to any other part of their line, or to any part of the *L. and B. line*, and paid to the *L. and B. Company* the agreed tolls. On appeal against a poor rate, held that, in ascertaining the rateable value of the appellants' rail-

way in the respondent parish, the tolls paid to the *L. and B. Railway Company* should first be deducted. *The Queen v. The Vestry and Churchwardens of St. Pancras*, 810.

Sewers. See *Metropolis Local Management Act*, II.

REASONABLE.

Notice. See *Bill of Sale*.

And probable cause. See *Rate, Church*.

Use of land. See *Nuisance*, I. II.

RECOVERY OF APPORTIONMENT.

See *Public Health Act*.

REFRESHMENT HOUSE.

By stat. 23 & 24 *Vict. c. 27. s. 32.* "every person licensed to keep a refreshment house under this Act, who shall knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises" is liable to a penalty recoverable before justices. Upon an information under this section, a metropolitan police magistrate convicted the appellant, and, in a case stated for the opinion of this Court, found that prostitutes assembled on the premises of the appellant in furtherance of prostitution. The Court upheld the conviction.

Per *Blackburn J.* It would be sufficient to warrant a conviction if the magistrate found that prostitutes assembled as such. *Belasco*, appellant, *Hannant*, respondent. *Barlow*, appellant, *Hannant*, respondent, 13.

See *Muster and Servant*, II.

RELATION, TITLE BY.

See *Bankruptcy*, VI. VII.

REMOVAL.

Of nuisance. See *Nuisance*, III. VI.

Order of. See *Pauper, Removal of*.

RENT CHARGE.

RENT CHARGE.

See *Income Tax. Rate, Poor, I.*

RENTING A TENEMENT.

See *Pauper, Settlement.*

REPAIR OF HIGHWAY.

See *Highway.*

REPLEVIN, JUDGMENT IN.

See *Rate, Church.*

REPLY, EVIDENCE IN.

See *Patent.*

REPRESENTATION.

See *Warranty, II. III V.*

RESTRAINTS OF PRINCES.

See *Insurance, Marine, I. II III.*

REVERSION, COVENANT RUNNING WITH.

See *Covenant running with Reversion.*

ROAD.

See *Turnpike. Highway.*

SALARY OF CURATE.

See *Rate, Poor, I.*

SALE.

See *Bankruptcy, I.*

Bill of. See *Bill of Sale.*

SATISFACTION.

See *Pleading.*

SCOTCH PAUPER.

See *Pauper Lunatic, V.*

SEARCH FOR DOCUMENT. 999

SEARCH FOR DOCUMENT.

See *Evidence, Secondary.*

SEAWORTHINESS.

See *Insurance, Marine, IV. V.*

SECOND ACTION.

See *Action, Second.*

SECONDARY EVIDENCE.

See *Evidence.*

SECURITY.

For debt. See *Bankruptcy, II. III.*

For costs. See *Action, Second.*

SEIZURE.

See *Bankruptcy, I.*

SELL, POWER TO.

See *Copyhold, I.*

SERVANT.

See *Master and Servant.*

SESSIONS.

Quarter. See *Evidence, Secondary.*

———, appeal to. See *Bastardy Order, Pauper, Removal of, II. III.*

Petty. See *Bastardy Order, I. III.*

SET-OFF.

See *Company, Joint Stock.*

SETTLEMENT.

See *Pauper.*

SEVERAL FISHERY.

The allegation of a several fishery, *primâ facie*, imports ownership of the soil: per *Wightman* and *Mellor JJ.*;

SEWERS.

Cockburn C. J. dissenting, but holding this Court bound by the authorities to that effect. *Marshall v. The Ulleswater Steam Navigation Company (Limited)*, 732.

SEWERS.

See *Public Health Act, II. Metropolis, Local Management Act, II. Water.*

SHERIFF.

See *Court, Contempt of.*

SHIPPING DOCUMENTS.

See *Contract, III.*

SIGNALS, FOG.

See *Gunpowder.*

SKUTCHING.

See *Print Works.*

SOCIETY, LOAN.

See *Loan Society.*

SOIL OF LAKES.

See *Lakes, Soil of.*

SOUTH WALES.

See *Highway, I.*

SPRINGS, UNDERGROUND.

See *Water.*

STANNARIES COURT.

See *Company, Mining, I. II.*

STATEMENT IN POLICY.

See *Insurance, Life, II. Marine, VII.*

STAYING PROCEEDINGS.

See *Action, Second. Company, Mining.*

SUMMARY CONVICTION.**SUMMARY CONVICTION.**

See *Justice of the Peace, Jurisdiction of. Refreshment House.*

SUMMONS.

See *Nuisance, III.*

Judgment. See *Court, County.*

Interpleader. See *Court, Contempt of.*

SUPERIOR COURT, TRANSMISSION OF CASE TO.

See *Justice of the Peace, III. IV.*

SURVEYOR OF HIGHWAY.

See *Highway, II.*

TIME, LIMITATION OF.

See *Public Health Act, I. IV.*

For appeal. See *Bastardy Order.*

TENEMENT, RENTING.

See *Pauper, Settlement of.*

TITHE COMMUTATION RENT CHARGE.

See *Rate, Poor.*

TITLE.

See *Justice of the Peace, Jurisdiction of, I.*

By relation. See *Bankruptcy, VI. VII.*

TOLL.

See *Turnpike, II. III.*

TRADE, LIBEL IN WAY OF.

See *Defamation, Libel, I.*

TRESPASS.

TRESPASS.

Ab initio. See *Distress*.

In search of game. See *Game. Justice of the Peace, Jurisdiction of, I.*

TRUST.

See *Copyhold, II.*

TURNPIKE.

I. The Turnpike Act, 3 G. 4. c. 126. s. 121., enacts, that if any person shall haul or draw upon any turnpike road "any timber, stone, or other thing, otherwise than upon wheeled carriages, or shall suffer any timber, stone, or other thing, which shall be carried principally or in part upon wheeled carriages, to drag or trail upon such road to the prejudice thereof," he shall be subject to a penalty not exceeding 40s. over and above the damages occasioned thereby. On an information for hauling and drawing upon the turnpike road a quantity of bolting straw otherwise than upon a wheeled carriage: held,

1. That a wheel-car, being a rough skeleton of woodwork, about fifteen feet in length and four in breadth, placed upon two wheels, which ran rather behind the centre, and the forepart of it (which was shod with iron) when going down hill slid along the ground and retarded its descent, was not a "wheeled carriage" within the meaning of the section. But,

2. Per *Crompton and Mellor JJ., Cockburn C.J.* dubitante, that the "other thing" so hauled or drawn must be ejusdem generis as timber or stone. *The Radnorshire County Roads Board, appellants, Evans, respondent, 400.*

II. The provision of stat. 3 G. 4. c. 126. ss. 28. 32., which exempts from toll on turnpike roads carriages employed only in carrying manure, and enacts that toll shall not be demanded for them "by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure, &c., being in or upon any such carriage, &c.,"

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is not repealed by stat. 5 & 6 W. 4, c. 18. s. 1., which enacts, that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, (save and except lime,) and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed." *Richens, appellant, Wiggins, respondent, 953.*

III. A person drove through a turnpike gate a cart laden with garden produce packed in baskets, paying the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty: Held, that no toll was demandable on account of these baskets being on the cart. *Id.*

UNDERGROUND SPRINGS.

See *Water.*

UNMARRIED WOMAN.

See *Court, County, II.*

UNION.

See *Pauper, Removal of, I. IV. V.*

UNTRUE STATEMENT IN POLICY.

See *Insurance, Life, II.*

USE, REASONABLE, OF LAND.

See *Nuisance, I. II.*

USER, PRIOR, OF PATENT.

See *Patent.*

VAGRANT.

I. Upon an information under stat. 5 G. 4. c. 83. s. 4., charging the respondent with running away from the parish of B., whereby his wife became chargeable to that parish, it appeared that he

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and his wife had separated by consent in 1858, when she had means of support, and that they had no personal communication until 1861, when she became chargeable without his knowledge: Held, that he had not committed the offence charged. *Sweeney*, appellant, *Spooner*, respondent, 329.

II. *Quere*. Whether upon such an information the evidence of the wife is admissible against her husband? *Id*.

VERBAL NOTICE OF APPEAL.

See *Bastardy Order*.

VESTRY MEETING.

See *Parish*.

VEXATIOUS INDICTMENTS.

I. Under The Vexatious Indictments Act, 22 & 23 *Vict. c. 17.*, it is sufficient if the consent of the Judge to the prosecution is given in writing; and no previous summons or notice to the party, or even affidavit of the facts, is necessary. *The Queen v. Bray*, 255.

II. The Court will not interfere with the exercise of the discretion of the Judge under this statute. *Id*.

III. A person having given evidence at a trial, the Judge did not give any direction to prosecute him for perjury. About a fortnight afterwards, application was made to the same Judge for his consent for that purpose. The party had received no notice of the application, which was not founded on either summons or affidavit; but a copy of a newspaper, containing a report of the proceedings at the trial, was laid before the Judge to refresh his memory as to the facts, on which he wrote "I consent to the prosecution in this case:" held sufficient within the statute. *Id*.

VICE WARDEN OF STANNARIES COURT.

See *Company, Mining*.

WAGES.

See *Master and Servant*, I.

WAIVER.

WAIVER.

See *Bill of Exchange*, I.

WARRANTY.

I. In policies of insurance and charter parties, the word "warranty" is synonymous with "condition." Per *Erle C. J.*, *Pollock C. B.*, *Williams* and *Keating JJ.*, and *Channell B.* *Behn v. Burness*, 751.

II. A "representation" is a statement, or assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it. *Id*.

III. Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. *Id*.

IV. With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a war-

ranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. *Id.*

V. The position that a statement of this kind in a charter party which may be regarded as a mere representation if the object of the charter party be still practicable, may be construed as a warranty, if that object turns out to be frustrated, denied to be law. *Id.*

See *Contract*, VII. *Insurance, Marine*, IV. VII.

WATER.

A. was the owner of an estate, part of which was situate upon a deep bed of gravel, which itself was imbedded in a basin of clay extending under it and the lands adjoining. In the lower part of it was a pond of the depth of four feet, formed in the gravel bed, which had existed there from time immemorial, and in which the water rose naturally in a considerable quantity from several powerful springs at the bottom of it, and thence overflowed the western edge of the clay basin, and formed a rivulet which ran through the grounds and supplied ornamental ponds therein; and was used for the cattle and for supplying the garden of the house. The Metropolitan Commissioners of Sewers, in constructing a sewer along and under the centre of a highway, cut through the bed of gravel and the basin of clay which enclosed it, at a distance from *A.*'s estate varying from 17 to 153 yards. The immediate effect was to drain the springs rising in the bed of gravel, and prevent them from finding their way into the pond, so that it became dry, and the rivulet and other ponds ceased to be supplied with water. The Metropolitan Sewers Act, 1848, 11 & 12 Vict. c. 112. s. 50., contains a proviso that where any work done by the Commissioners in pursuance of the provisions of the Act "shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby in manner herein provided con-

cerning compensation to persons sustaining damage by reason of the exercise of any of the powers of this Act." Sect. 69 enacts that full compensation shall be made out of the rates to be levied under the Act "to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." Held,

1. That independently of the statute *A.* was not entitled to compensation, as the effect of the sewer was only to intercept underground springs, which would otherwise rise into the pond.

2. That *A.* was not entitled to compensation under sect. 69 of the statute; per *Cockburn C. J.*, *Wightman* and *Mellor JJ.*: nor under the proviso in sect. 50; per *Wightman* and *Mellor JJ.*; *Cockburn C. J.* dissentiente, on the ground that *A.* had a right to the water after it had risen to the pond, and that right had been interfered with and prejudicially affected. *The Queen v. Metropolitan Board of Works*, 710.

WAY.

Foot. See *Nuisance*, V.

High. See *Highway*.

Of necessity.

Where the owner of a farm divided it by his will into two portions, devising them to *A.* and *B.* respectively, and the portion of *B.* was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of *A.*, and the deviser during his life had used a way in a certain direction over that property: held, by the Exchequer Chamber, affirming the decision of the Queen's Bench, that a right to use that way passed to *B.* by the devise. *Pearson v. Spencer*, 761.

WIFE.

Admissibility of evidence of, against husband. See *Vagrant*, II.

Leaving chargeable. See *Vagrant*, I.

Separation of, from irremovable husband. See *Pauper Lunatic*, IV. V.



THE END.



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